

Domestic Violence and *Shari'a*:

A Comparative Study of Muslim Societies in the Middle East, Africa and Asia

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Introduction

On March 12, 2000, some 300,000 demonstrators took to the streets of Rabat, Morocco, expressing their support for a new law expanding women's right to divorce. Simultaneously, a comparable number of demonstrators took to the streets of the nearby city of Casablanca to protest the law as a deviation from *shari'a* (Islamic law). While divorce is a permissible and established option in Islam, in many Muslim societies it tends to be treated as a male prerogative; women can easily *be divorced*, but not *seek divorce*.^{1[1]} The new Moroccan law aimed to lessen this gender imbalance,^{2[2]} sparking the competing demonstrations that, together, offered anecdotal evidence of sharply divergent views on Muslim women's rights.

Opponents of the new law framed their position as a defence of religion and the family, claiming that the law conflicts with women's duties to their husbands, and contravenes their *shari'a*-based status as legal minors. Supporters heralded the new law as an advance for women, not (necessarily) a repudiation of *shari'a*. Those who had been working for years to bring such a law into being had sought to alter women's status as perennial subordinates in the context of the family. Indeed, the law's significance, recognized by opponents and supporters alike, was its potential for eroding masculine privilege, albeit slightly, by enhancing women's options to end a marriage.

In Morocco, as elsewhere, one of the most common reasons women would seek to end a marriage is to extricate themselves from a harmful situation. This illuminates the connection between the right to divorce and female vulnerability to domestic violence.^{3[3]} Domestic violence can be defined as violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law, [It is] nearly always a gender-specific crime, perpetrated by men against women.^{4[4]} One of the strongest predictors of violence against women is the restriction on women's ability to leave the family setting.^{5[5]} But, as most women's rights activists

^{1[1]} In 1958, two years after Morocco gained its independence from France, the state established a Code of Personal Status (*Mudawwana al-Ahwal al-Shakhsyah*), which reiterated and codified the (Maleki) tradition of family law jurisprudence. Among the provisions of this code was the husband's right to dissolve the marriage at will by means of *talaq* (repudiation), stating, "I divorce thee three times, although the code instituted the requirement of two witnesses to authenticate the divorce. If the husband chose to divorce his wife, she had no legal recourse, while her right to divorce was restricted and subject to confirmation by a *shari'a* court.

^{2[2]} The background to this new law includes prodigious advocacy efforts by women's rights activists, and the political transition on the death of King Hassan II, who was succeeded by his son, Muhammad. Morocco has a vibrant women's rights movement, although there are some notable differences in the interests and goals that various sectors pursue; some have taken the position that women's rights can be assured and protected only through the replacement of the *Mudawwana* with a secular code enshrining liberal values, including the enforcement of the equality provisions of Morocco's constitution. Others have sought to expand women's rights through the reform of Islamic jurisprudence, and to these ends the country has been a center of some extremely innovative efforts to reinterpret Quranic verses and *hadith* in a manner that would enhance the rights and equality of women. As a result of activism in the early 1990s, some modest reforms of the *Mudawwana* were instituted in 1993. But the accession to the throne by Muhammad, who, by many accounts is committed to bolder legal reforms, set the stage for the promulgation of the new law.

^{3[3]}? The Moroccan Code of Personal Status has served to foster conditions in which domestic violence is tolerated. For example, while the Code does allow for the possibility of divorce on the grounds of general harm, rules of evidence that would enable women to prove such harm are extremely difficult to fulfill. Moreover, *shari'a* court judges tend to be skeptical of such charges and inclined to advocate reconciliation of the couple rather than prioritize relief for the wife.

^{4[4]} Radhika Coomarswamy (UN Special Rapporteur on Violence against Women), Further Promotion and Encouragement of Human Rights and Fundamental Freedoms Report to the UN Commission on Human Rights, February 6, 1996 (E/CN.4/1996/53).

^{5[5]} In a comparative study of gender violence in 90 societies, four socio-cultural factors, taken together, were shown to be a strong predictor of spousal abuse in 75 societies. These factors are: 1) sexual economic inequality; 2) a pattern of using violence for conflict resolution; 3) male authority and decision-making in the home; and 4) divorce restrictions for women. The study found that the more dependent women are on men, the more vulnerable they are to violence. David Levinson, *Domestic Violence in Cross-cultural Perspective* (Newbury Park: Sage, 1989).

would concede, divorce does not constitute an adequate form of protection, or even an option for many women. Myriad factors discourage, impede or prevent women from leaving a violent relationship, including a lack of resources or support to establish alternative domestic arrangements, and powerful social expectations and pressures to maintain family relations at any cost.

In this study, the central question concerns the relationship between domestic violence and *shari'a*. This relationship is of critical importance because *shari'a* provides both the legal framework for administering family relations and a religio-cultural framework for social norms and values in Muslim societies. As the example of demonstrations over the Moroccan divorce law illustrates, there are strong interconnections among gender relations, religion and law. The example also illustrates the challenges to pursuing legal reforms to enhance women's rights, and the ability indeed, the likelihood that constituencies with different interests and perspectives will mobilize and compete for state support.

This study seeks to provide an analytical framework and a comparative assessment of domestic violence in Muslim societies in the Middle East, Africa and Asia. The approach is socio-legal, probing the functions and uses of religious and other bodies of law, and tracing struggles over the rights of women in the context of domestic relations. Given the importance and attention devoted to the relationship between women's rights and Islam, to date surprisingly little comparative analysis has been generated about the relationship between domestic violence and *shari'a*. This study is an effort to redress this lacuna.

Gender (In) Equality, Women's Rights, and the Problem of Domestic Violence

Inequalities between men and women are common the world over, albeit the forms and conditions vary and change. It is a nearly universal truism that gender *matters* in ways that make and keep women relatively less free, less independent, less empowered, less financially and physically secure than men.

The arena where gender inequalities are most entrenched, in the context of family relations, is also where they are most widely accepted and thus most difficult to alter. Sexual and other physical differences between men and women lend themselves to understandings of social inequalities as both derivative of and conforming to nature, especially in terms of family roles and relations. Such understandings prevail in many cultures. But the challenges of contesting and altering inequalities are compounded in societies where gender and family relations are governed by religious laws, because the resultant hierarchies can be defended as divinely sanctioned.

Debates over the legitimacy of gender equality have been especially vigorous in Muslim societies, and display some common patterns related to *shari'a*.^{6[6]} The Quran, which believers accept as the literal word of God and thus eternally applicable, contains many verses that would seem inescapably discriminatory toward women. So, too, do many of the *hadith* (sayings by and stories about the Prophet Muhammad). Yet there are also many Quranic verses and *hadith* establishing the equality of men and women. These seeming contradictions lend themselves to multiple readings, claims and counter-claims about what Islam prescribes for women.^{7[7]}

Although the use of *shari'a* to administer family relations^{8[8]} contributes to certain commonalities in gender relations across Muslim societies, notably the privileging and empowerment of men over women within the context of the family, it is important to note significant variations as well. The state is the most important variable for understanding variations across societies, since, in the modern era, the state is the primary arbiter of law. State power is deployed to regulate gender and family relations, as well as the role of religion in society. Across the three

^{6[6]} *Shari'a* encompasses the ordinances derived from the Qur'an and *hadith*, and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence (*fiqh*). The two main methods are *ijma'* (consensus among Muslim jurists) and *ijtihad* (interpretation based on accepted rules of logic and religious texts).

^{7[7]} The literature on women and Islam is vast. See Asghar Ali Engineer, *The Rights of Women in Islam* (NY: St. Martin's Press, 1992); Camilla Fawzi El-Solh and Judy Mabro, eds., *Muslim Women's Choices: Religious Belief and Social Reality* (Oxford, UK: Berg Publishers, 1994); Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Reading, MA: Addison-Wesley Publishing Co., 1991); Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (London: Zed Books, 1999); Mai Yamani, ed., *Feminism and Islam: Legal and Literary Perspectives* (New York: New York University Press, 1996).

^{8[8]} These family relations, also known as personal status issues, include marriage, divorce, custody, and inheritance.

regions that are the focus of this study, the history and politics of the state that is, the specific experiences and legacies of colonial rule, and the trajectories of national independence, integration and development have given rise to vastly different state projects and agendas in regard to gender relations, law and religion, and the relationship among them.

State formation affects the position of women in society in several ways. In particular, the state mediates gender relations through the law in its attempts to foster or inhibit social change, to maintain existing arrangements or to promote greater equality for women in the family and the society at large.^{9[9]}

The role of the state is particularly important to any discussion of domestic violence because of its capacity and responsibility to regulate (i.e., prohibit, punish, etc.) *violence*. For the purpose of this study, which focuses on (and is limited to) relations and practices governed by *shari'a*, the categories of domestic violence considered here include, inter alia, beatings, battery and murder; marital rape; and forced marriage.

When violence occurs within the context of the family, it raises questions about the laws and legal administration of family relations. Are violent practices among family members legally permitted or prohibited? In practice, are they ignored, tolerated or penalized? Do perpetrators enjoy impunity (whether de jure or de facto) or do they stand to be punished? Are civil remedies available to victims (e.g., right to divorce, restraining orders)? Even failure or refusal on the part of the state to deal with intra-family violence is an act, not an omission or absence, of law.

In the 1970s, women's rights activists in many Western societies began pursuing an agenda (generally successfully) of bringing criminal law to bear on intra-family violence.^{10[10]} One outcome was to open up the private sphere of the family to increased state intervention, at least in principle, by establishing prohibitions and punishments for violence between family members. Criminalization has undermined the ability of perpetrators to claim that what they did at home was private. The model of criminalizing domestic violence has become a popular goal in other parts of the world as well.^{11[11]}

Advocates of the criminal justice approach point to the symbolic power of the law and argue that arrest, prosecution and conviction, with punishment, is a process that carries the clear condemnation of society for the conduct of the abuser and acknowledges his personal responsibility for the activity? It is, however, critical that those involved in policy making in this area take into account the cultural, economic and political realities of their countries.^{12[12]}

The prospect of prohibiting and punishing domestic violence depends, foremost, on the state's willingness and capacity to reform criminal and family laws. But the issue and possibility of state-sponsored reforms is strongly affected by social beliefs and ideologies about gender and family relations.

^{9[9]} Mounira Charrad, "State and Gender in the Maghrib", *Middle East Report*, no. 163 (March-April 1990), p. 20.

^{10[10]} In the US, women's rights activists initially began addressing domestic violence by responding to the concrete, urgent needs of victims by mobilizing to set up shelters and other resources to protect and assist vulnerable women. Later, frustrated by the unresponsiveness of the judicial system to battered women's situation, they turned toward a structural approach to criminalize domestic violence. *State Responses to Domestic Violence: Current Status and Needed Improvements* (Washington, DC: Women, Law and Development International, 1996), p. 10.

^{11[11]} But even in countries where a criminal justice approach has been adopted, for example the United States, there are serious problems and limitations to relying so thoroughly on the state. If the state lacks legitimacy, as it does for communities and populations subject to discrimination, victims are unlikely to see the state as a source of relief and protection, and disinclined to bring the police into their homes or turn in family members. See Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore, MD: The Johns Hopkins University Press, 1988); Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", in Crenshaw et al., eds., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995); Linda G. Mills, "Killing Her Softly: Intimate Abuse and the Violence of State Intervention", *Harvard Law Review* 113/2 (1999).

^{12[12]} Radhika Coomarswamy, "Combating Domestic Violence: Obligations of the State", in *Domestic Violence against Women and Girls* (Florence, Italy: Innocenti Research Center, UNICEF, 2000), p. 11.

Law reform strategies work best when the social value base is in concordance with the desired new norms. As long as the old regime of values is in effect, the tasks of making the new norms operative, or activating the educative function of law to change values, will be difficult and require action on many fronts.¹³[13]

When the administration of family relations is based upon or derived from religious texts and traditions, as is the case in Muslim societies where *shari'a* constitutes the framework for family law, the possibility for reform is contingent on a serious and respectful engagement with religious beliefs and practices. But the challenges to reform law in order to promote and protect the rights of women are daunting; in many contexts, *shari'a* is interpreted to allow or tolerate certain forms of violence against women by male family members. This raises questions and stimulates debates about what religion says (or is believed to say) about the rights of women. It also raises questions about the willingness or ability of the state to prevent violence within families, especially when prevailing views or powerful constituencies regard curbs on male authority as a contravention of *shari'a*.

A Framework for Comparative Analysis

To establish a framework for comparative analysis of the relationship between domestic violence and *shari'a* in Muslim societies, three factors must be taken into consideration. One is the marked variation in the uses and interpretations of *shari'a*, which evince a lack of consensus among Muslims and should deter over generalizing about Islam. Across and even within these societies, there are differences in popular, scholarly and official understandings as to whether Islam sanctions wife beating and other forms of intra-family violence.¹⁴[14]

A second factor is the relationship between religious law and state power. For comparative purposes, this relationship can be divided into three general categories (which are elaborated in greater detail below): In some countries, the state communalizes religion by according its authorities and institutions semi-autonomy from the national legal regime, the latter under the direct control of the state. In other countries, the state nationalizes religious law by utilizing and incorporating its principles into the national legal regime. And in a few countries, the state theocratizes religion by basing its own authority on religious law and functioning as its enforcer.

A third factor to consider in assessing the relationship between domestic violence and *shari'a* is the influence of trans-national discourses and movements. Two in particular are worth noting because of their relevance to the subject of this study: Islamization and human rights. Since the 1970s, Islamist movements have mobilized in many countries across the Middle East, Africa and Asia to demand a (re)turn to Islam through the establishment of a system of government that adheres to and enforces *shari'a*.¹⁵[15] In some countries, Islamists represent an opposition movement, in others they represent an influential constituency, and in a few they have assumed control of the state. However, regardless of the relationship between Islamist movements and regimes, there is a generally shared commitment to the preservation of patriarchal family relations. Indeed, even in contexts where Islamists constitute a hostile opposition, states often are willing to accommodate their demands on matters of gender and family relations as a means of placating them.¹⁶[16]

Since the 1970s, there has also been a mobilization of movements to promote international human rights. Human rights organizations have been established in most countries, leading to greater awareness of the discourse and principles of international law, and, consequently, more visibility and critique of violations. The kinds of activities that comprise this trend include monitoring and reporting on rights violations, networking with activists from other

¹³[13] *State Responses to Domestic Violence*, op. cit., p. 37.

¹⁴[14] Domestic violence includes psychological as well as physical abuse. Psychological aspects that have a relationship to *shari'a* include behavior intended to intimidate and persecute, such as threats of abandonment, divorce or abuse; confinement and surveillance; threats to take away custody of children; verbal aggression and humiliation.

¹⁵[15] See Joe Stork and Joel Beinin, eds., *Political Islam* (Berkeley: University of California Press, 1997).

¹⁶[16] See Fred Halliday and Hamza Alavi, eds., *State and Ideology in the Middle East and Pakistan* (London: Macmillan, 1988); Deniz Kandiyoti, *Bargaining with Patriarchy*, *Gender & Society*, vol. 2, no. 3 (1988).

countries and regions, and advocating that governments adopt, adhere to and enforce international legal standards locally.¹⁷[17]

The issues of women's rights within the family and the role of *shari'a* have been central concerns to both of these movements, albeit in often contradictory and even adversarial ways. The critical and debatable question is whether Islam and human rights offer compatible worldviews, and if not, which should prevail. This is not an abstract philosophical matter; it is a deeply charged political concern that informs the strategies that local actors pursue to institute their visions and goals, whether their priority is to promote women's rights in accordance with international law, to promote an authentically Islamic social order (however that is interpreted), or to reconcile religious laws and beliefs with women's rights.¹⁸[18]

Aims and Methods of This Study

This thematic study on the relationship between domestic violence and *shari'a* is part of a larger project on Islamic family law.¹⁹[19] This study was designed with three main aims: 1) to map the problem of domestic violence in Muslim societies in the Middle East, sub-Saharan Africa and Asia; 2) to analyze and compare how states deal with this problem; and 3) to analyze and compare variations in interpretations and applications of *shari'a* in regard to intra-family violence.

Domestic violence is an extremely difficult subject to study because of the dearth of reliable information. This is the case not only in Muslim societies but virtually everywhere. The reasons for this include: the inability or disinclination of victims to report violence; refusal or failure of authorities to document reports and/or make reports publicly available; and official and/or social acceptance of certain forms and degrees of intra-family violence. Hence, the quality and availability of information about domestic violence varies, from non-existent to partial at best.

In the societies that are the focus of this study, estimated rates of domestic violence tend to be high. However, the available information is extremely limited and uneven. Egypt and Palestine are the only countries in the three regions for which national studies that focus on or include domestic violence have been undertaken.²⁰[20] For some countries, there is virtually no statistical information whatsoever. Most information about domestic violence that does exist comes from local and international organizations, including women's and human rights organizations, and certain bodies of the United Nations with mandates that focus on or include women's rights.²¹[21] The lack and unevenness of information is an important finding in its own right. But clearly, it makes the first aim of mapping domestic violence in Muslim societies all but impossible.

In regard to the second aim of analyzing and comparing how states deal with domestic violence, the two most important issues are the administration and laws governing gender and family relations, and official commitment (or lack thereof) to women's rights. The kinds of questions that this research raises include the following: Has the state signed and ratified the Convention to Eliminate All Forms of Discrimination against Women (CEDAW)? If so, has it registered any reservations on the grounds that CEDAW conflicts with *shari'a*? Is there a constitutional authority guaranteeing equal protection of law for women, and if so, is this authority used effectively to

¹⁷[17] For information about NGO activities and initiatives in the Arab world, see Amal Abdel Hadi and Nawla Darwiche, *Strategies to Fight Domestic Violence against Women in the Arab Countries* (NY: UN Division on the Advancement of Women, draft, n.d.).

¹⁸[18] See Mahnaz Afkhami and Haleh Vazeri, *Claiming Our Rights: A Manual for Women's Human Rights Education in Muslim Societies* (Bethesda, MD: Sisterhood Is Global Institute, 1996).

¹⁹[19] See www.law.emory.edu/IFL

²⁰[20] Fatma El-Zanaty et al., *Egypt Demographic and Health Survey 1995* (Cairo: National Population Council, 1995); M.M. Yahia, *The Incidence of Wife Abuse and Battering and Some Sociodemographic Correlates as Revealed in Two National Surveys in Palestinian Society* (Ramallah, Palestinian Authority: Besan Center for Research and Development, 1998).

²¹[21] The research for this study draws upon secondary sources, including reports and studies by organizations, research institutions and scholars who work on domestic violence. Three researchers, each working on a specific region (Bashar Tarabieh for the Middle East, Ngone Tine for sub-Saharan Africa, and Patty Gossman for Asia), have surveyed the existing resources, and their research is incorporated in this study.

prohibit and punish domestic violence? Is there national legislation and/or administrative sanctions prohibiting domestic violence? What measures, if any, has the state taken or authorized to deal with domestic violence and the protection of victims (e.g., provision of social services and health care, education campaigns)? Some information about the role and activities of the state, such as ratification and reservations to CEDAW, is publicly available. But information about the laws, policies and jurisprudence pertaining to domestic violence is far more difficult to gather. The best sources tend to be organizations that work on women's rights issues, and these vary from country to country.

In regard to the third aim of analyzing and comparing interpretations and applications of *shari'a* as it impacts upon the issue of intra-family violence, this study makes no claim to provide an authoritative opinion on what Islam really mandates. Rather, the issue is what authorities and members of society believe and accept, and how these beliefs are shaped, debated and transformed. Despite variations across societies, there are some commonalities, not least a general tendency to interpret *shari'a* as sanctioning gender inequality in family relations. Specifically, *shari'a* tends to be interpreted to give men power over women family members. Thus, gender inequality is acknowledged, and justified in religious terms on the grounds that God made men and women essentially different; that these differences contribute to different familial roles, rights and duties, which are complimentary; and that this complimentary is crucial to the cohesion and stability of the family and society.

Domestic violence is strongly and directly related to inequality between men and women. But the contested legitimacy of gender equality in Muslim societies impedes or complicates efforts to deal with domestic violence as a social problem. There is strong opposition to the notion that men and women *should be equal* in the context of the family. The corollary is the belief that domestic relationships are legitimately (i.e., naturally and/or divinely) hierarchical. This belief is both derived from and reinforced by *shari'a*. However, for analytical purposes, this study brackets the question of whether *shari'a* lends itself to or opposes formal equality for men and women in order to foreground the issue of violence. Specifically, the question addressed here is whether *shari'a* is interpreted to construe violence against women as *harm or right*.

As a point of clarification, the bracketing of gender inequality distinguishes the approach of this study from most mainstream feminist and human rights discourse, which tend to see and treat inequality as *causal* for domestic violence.²²[22] This inclines feminists and human rights activists to regard the struggle for gender equality as the *means* of combating domestic violence.²³[23] This is premised on the idea that if women were equal to men and had equal protection under the law, men would not be able to get away with perpetrating violence against them. While this is a valid assumption, it either fails to engage with or de-legitimizes the beliefs and ideologies (in this case religious and cultural) that provide *justification* for inequalities.

Indeed, gender inequality and domestic violence *are* integrally related, and this understanding informs the analysis here. But in this study, the primary emphasis is on *violence*, and the social and cultural context in which it occurs. This relates domestic violence to a lack of rights for women in order to probe the rationales and justifications for that lack.

Defining violence in this way allows us to address the record of violence against women as one not composed of a series of instances of abuse but as one located in a broad social and political context in which not only men but women and society as a whole act to perpetuate systems which result in various forms of abuse.²⁴[24]

22[22] See R.E. Dobash and R.P. Dobash, *Violence against Wives: A Case Study against Patriarchy* (London: Open Books, 1980); idem., *Women, Violence and Social Change* (London: Routledge, 1992).

23[23] See Jane Connors, Government Measures to Confront Violence against Women, in Miranda Davies, ed., *Women and Violence: Realities and Responses Worldwide* (London: Zed Books Ltd., 1994); Radhika Coomarswamy, Violence against Women in the Family, Report to the Commission on Human Rights, March 10, 1999 (E/CN.4/1999/68).

24[24] Nahid Toubia, Women's Reproductive and Sexual Rights, in *Gender Violence and Women's Human Rights in Africa* (New Brunswick, NJ: Center for Women's Global Leadership, 1994), p. 17.

Focusing critically on the rationales that people actually utilize to claim that men have the right to perpetrate violence against women has the potential to alter gender inequalities in all social spheres. Conversely, establishing the illegitimacy of violence against women undermines a tangible and harmful manifestation of masculine privilege. But such an approach is less controversial and hopefully more persuasive because it targets violent practices rather than gender inequality. Moreover, it recognizes that the priority and interest of most victims of violence would be to end the abuse, not their domestic relations.

The comparative dimension of this study turns on the ways in which *shari'a* informs both official policies and, more broadly, popular attitudes about intra-family violence. Among Muslims, adherence to *shari'a* principles tends to be construed as a means of demonstrating a commitment (socio-cultural as well as religious) to Islam. Thus, this study strives to engage seriously with beliefs and practices that underlie this commitment. However, this does not translate into a cultural relativist sanctioning of violence against women.^{25[25]} The assumption here is that domestic violence is a problem that demands recourse, and that such recourse is not inimical to Islam.

It is the hope of those involved in this study, and in the larger Islamic Family Law project of which it is a part, that this research will provide a resource for action and advocacy to combat the problem of domestic violence, and to enhance legal and other remedies available to victims. Although the problem of domestic violence and efforts to deter and combat it are global in scope, any possibility for success must involve strategies and analyses that resonate with cultural and religious norms and values.

The remainder of this study is organized as follows: The next section lays out a framework for analyzing domestic violence as a legal and a social problem. The following section focuses on domestic violence and *shari'a* in general terms of the scriptural and interpretive stances that inform their relationship. The third, fourth and fifth sections focus, respectively, on efforts to establish an international legal framework for combating domestic violence within a larger campaign for women's rights, cultural resistances to women's rights, and manifestations of such resistance within Muslim societies that utilize adherence to *shari'a* as their basis. The final substantive section presents a comparative analysis of domestic violence in Muslim societies, highlighting variations in the relationship between religion and the state as it impacts upon the issue of intra-family violence.

The Problem of Domestic Violence

Domestic violence is a global phenomenon, and the seriousness of this problem cannot be overstated. According to feminist geographer Joni Seager, it is reported as common in almost all countries.^{26[26]} It affects millions of women annually. According to Human Rights Watch, it has been one of the principal causes of female injury in almost every country in the world.^{27[27]}

But domestic violence is also a hidden problem. For many countries, there is little or no statistical information, indicating that it is a crime that is under-recorded and under-reported.^{28[28]} For countries where data is available, the rates vary.^{29[29]} For example, in the United States, an estimated 28 percent of women have been

^{25[25]} See Ann Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder, CO: Westview Press, 1991).

^{26[26]} Joni Seager, *The State of Women in the World Atlas* (London: Penguin Books, 1997), pp. 26-27. The few countries where domestic violence is not reported as common include Cote D'Ivoire, Djibouti, Laos, Madagascar and the Maldives.

^{27[27]} *Human Rights Watch World Report 1998* (New York), p. 392.

^{28[28]} UNICEF, *Domestic Violence against Women and Girls* (Florence, Italy: Innocenti Research Center, 2000), p. 4.

^{29[29]} Research on domestic violence is fairly new, and has been undertaken perhaps only in the last 25 years. An increasing number of studies are now being undertaken in the developing world. Understanding the Problem (from the UN resource manual *Strategies for Confronting Domestic Violence*), in Davies, ed., *Women and Violence*, op. cit., p. 2.

victims of domestic violence at least once in their lives. In South Africa, the estimate is 48 percent. In Pakistan, estimates range from 80 to 90 percent.³⁰[30]

The prevalence of domestic violence is a powerful indication of the inequality and vulnerability of women across cultures. Domestic violence is the most common form of gender violence, the latter encompassing all forms of violent practices perpetrated on females *because they are females*.

Whether gender violence operates as direct physical violence, threat, or intimidation, the intent is to perpetuate and promote hierarchical gender relations. It is manifested in several forms, all serving the same end: the preservation of male control over resources and power.³¹[31]

What distinguishes domestic violence from other forms of gender violence is the context within which it occurs (the domestic or private sphere) and the nature of the relationship between perpetrators and victims (familial). Because domestic violence occurs within the private sphere of the family, making it visible (as a first step to making it redressed) is exceedingly difficult. It is the very intimacy of domestic space and relationships that makes such violence difficult to study and document. And it is the importance of the family in every society that makes the formulation of effective strategies to protect women from abuse so controversial.

In the case of intimate violence, male supremacy, ideology and conditions confer upon men the sense of entitlement, if not the duty, to chastise their wives. Wife-beating is, therefore, not an individual, isolated, or aberrant act, but a social license, a duty or sign of masculinity, deeply ingrained in culture, widely practiced, denied and completely or largely immune from legal sanction.³²[32]

Women who are subjected to or threatened with violence at home often are incapacitated *by the violence itself* (physical, psychological, emotional) from seeking protection. They may be paralyzed by terror and the ever-present threat of attack. Victims also often are deterred from even imagining alternatives because of the importance of family as a social institution. This vulnerability is compounded by economic dependence on male family members, and by the fact that many women's principal identity derives from their membership and role in the family. The problem of domestic violence is exacerbated by social and legal constructions of the family as private, and popular perceptions of male power (including to dominate and aggress against women) as normative.

Although domestic violence occurs within families and overwhelmingly targets women, it is neither a private matter nor a women's problem; it is a societal problem, implicating both the ruling state and the community within which families are socially situated. Yet there is great reluctance or resistance in societies around the world to recognize and deal with this problem because of an unwillingness to see such practices *as violence*. By imagining and referring to beatings, confinement, intimidation and insults as discipline or punishment, rather than battery or abuse, the nature of harm is obfuscated. Moreover, if prevailing social beliefs about family relations include the idea that men have a right or obligation to punish and discipline women family members, then the tactics used to do so can be seen and even lauded as necessary to maintain order both at home and in society at large. If, however, the safety and rights of women are or can become the priority, then the use of violence against them can be seen and criticized as illegitimate.

In contexts where intra-family violence is not explicitly prohibited by law (i.e., criminalized), perpetrators enjoy *legal impunity*. In contexts where it is prohibited but the laws are not enforced, perpetrators enjoy *social impunity*. In either situation, such impunity constitutes a failure on the part of the state to exercise its powers and prerogatives to deter, punish and prevent violence against its subjects. It is also a failure of society to reject and condemn the brutalization and intimidation of women at the hands of family members.

³⁰[30] Seager, *The State of Women in the World Atlas*, pp. 26-27.

³¹[31] December Green, *Gender Violence in Africa: African Women's Responses* (New York: St. Martin's Press, 1999), pp. 1-2.

³²[32] Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in Rebecca Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), p. 116.

As those involved in efforts to eradicate violence from women's family lives attest, changing social attitudes and official policies that contribute to the problem are arduous tasks. Exposing and criticizing domestic violence calls into question the structures and discourses of familial authority. Seeking means of ameliorating the problem entails challenges and changes to the ways in which such authority is legitimated and enforced. It entails, in short, changes in *law* and *society*.

Even in societies with robust legal rights for women, domestic violence is both commonplace and hidden, signaling an enduring difficulty to activate a legal solution. In societies where women's rights are weak, their vulnerability to violence is compounded by a lack of options to seek protection from the law. And in societies where gender and family relations are derived from religious law, if jurists interpret and apply the law to sanction violence for specific purposes or under certain circumstances, demands for protections and greater rights for women can be condemned as heresy or apostasy. In Muslim societies where family relations are administered in accordance with *shari'a*, intra-family violence is connected to the discourse and practices of religion. Thus, it is crucial to consider the terms of this connection.

Shari'a and Domestic Violence

In Muslim societies, *shari'a* functions both as specific legal rules for organizing social relations, and as a general religio-cultural framework for norms and values.^{33[33]} In both senses, dominant interpretations of *shari'a* accord men the status as heads of their families with guardianship over and responsibility for women. The complement to this is the expectation that women have a duty to obey their guardians (husbands, fathers or other male heads of family). This hierarchical and highly patriarchal relationship is based on the *shari'a* principles of *qawwama* (authority, guardianship) and *ta'at* (obedience), from which gender-differentiated rights and duties are derived.

The primary source of the Quranic principles of *qawwama* and *ta'at* is Sura 4, Verse 34. This same verse contains the most commonly cited reference used to assert men's right or option to beat disobedient women. Although this verse is translated and interpreted in a variety of ways,^{34[34]} a literal English translation, which captures popular understandings about authority, (dis)obedience and punishment, states:

Men have authority [*qawwama*] over women because Allah has made the one superior to the other, and because they [men] spend their wealth to maintain them [women]. Good women are obedient [*ta'at*]. They guard their unseen parts because Allah has guarded them. As for those [women] from whom you fear disobedience [*nushooz*], admonish them and send them to beds apart and beat them. Then if they obey you, take no further action against them. Allah is high, supreme.^{35[35]}

Asghar Ali Engineer reports the historical origin of this verse as the case of a man (S'ad bin Rabi') who slapped his wife (Habiba bint Zaid) because she had disobeyed him. She complained to her father, who complained to the Prophet Muhammad. Sympathizing with the woman, the Prophet told her that she was allowed the right to *qisas* (a form of legal retribution). Men in the community protested that this would give women advantages over

^{33[33]} Specific legal rules that epitomize and maintain gender inequality include men's right to marry up to four women while women are restricted to marriage to one man at a time; differences in right to divorce, custody and inheritance; and differences in legal competency. Nevertheless, women are not entirely disadvantaged by *shari'a* nor thoroughly unequal to men; women have legal and financial rights, including independence (at least in principle) to manage their own affairs. Women are recognized as equal to men before God, the critical issue being not gender but devotion and righteousness.

^{34[34]} For a discussion of interpretations of Sura 4:34 in medieval and modern Islamic thought, see Barbara Stowasser, *Gender Issues and Contemporary Quran Interpretation*, in *Islam, Gender and Social Change*, eds. Yvonne Haddad and John Esposito (New York: Oxford University Press, 1998).

^{35[35]} This translation is from *The Koran*, trans. N.J. Dawood (NY: Penguin Books, 1974), p. 370. For significantly different translations of this Sura, see Engineer, *The Rights of Women in Islam*, op. cit., p. 46; Abdullahi An-Na'im, *Islam and Women's Rights: A Case Study, Women Living under Muslim Law Dossier* 14/15, p. 97.

them. Fearing social unrest, the Prophet sought and received the revelation (4:34) which effectively reversed his earlier ruling giving women the legal right to retaliate.³⁶[36]

In drawing interpretative meaning from this verse, several factors are at issue. First, because this was a *revelation*, it lends itself to interpretation that God sanctions beating disobedient wives as a last option (after admonishing them and abandoning their beds). But because beating women was quite common in that place and time, it also lends itself to the interpretation that God intended to restrict the practice. Moreover, to the extent that *shari'a* functions as living law adaptable to changing circumstances (e.g., through *ijtihad*), even the explicit sanctioning of beating can be construed not as an ageless and divine right but as a circumscribed means to express anger and frustration, and one that gradually should be abolished. For example, Azizah Al-Hibri argues that the Qur'an imposed limits on the common practice of beating, and transformed it into a symbolic act.³⁷[37] Hitting was not to be a normative standard of spousal relations but used minimally if it could not be avoided entirely. Al-Hibri supports this reading by pointing to the Prophet's declaration to men: The best among you are those who are best toward their wives. Indeed, on numerous occasions he told men not to beat their wives and condemned the practice.

Other Qur'anic verses and *hadith* condemn violence between spouses. For example, Sura 30, Verse 21 describes marital relations as tranquil, merciful and affectionate, and the relationship itself as based on companionship, not service or tyranny. In this vein, Riffat Hassan writes, God, who speaks through the Qur'an, is characterized by justice, and can never be guilty of *zulm* (unfairness, tyranny, oppression or wrongdoing). Hence, the Qur'an, as God's word, cannot be made the source of human injustice.³⁸[38]

Islamic jurists and scholars have grappled with the question of whether hitting constitutes a *de jure* right under *shari'a*, or a *de facto* option. For example, some jurists have proposed that men should be prohibited from hitting women in the face or hard enough to cause pain. But the lack of clarity and consensus on this issue makes it difficult to mount a campaign against wife beating as unjust *in principle*.

While authorities responsible for the administration of family relations are not categorically indifferent to the beating or brutalization of women, the violence usually has to be extreme to prompt intervention, if that is a possibility at all. In fact, most of what is known about wife beating emerges out of divorce cases in which women use violence as a cause for seeking divorce. Even then, however, because of the importance of family relations, saving the marriage often is prioritized over saving or protecting women from violence. In many contexts, for a woman to obtain a divorce from a *shari'a* court on the grounds of violence, the harm would have to be so great and provable that the judge would determine continued cohabitation to be impossible. Under *shari'a*, legally proving harm in the face of denial by the husband requires two witnesses, which often is difficult to provide because domestic violence happens in private. And legally proving the impossibility of cohabitation is difficult because women often have to remain in or return to their marital home for lack of alternatives.

The notion that beating constitutes a right available to men and enforceable by law certainly contradicts the Qur'anic ideal of marital relations as companionable and mutually supportive. It also runs contrary to the Quranic right of both men and women to dissolve a failed marriage, which would seemingly override the notion that women have a duty or obligation to submit to violence. Yet because there *is* a mention of beating in the Quran, it has impeded efforts to prohibit and criminalize domestic violence, and contributes to social attitudes about beating as a legitimate reprisal for disobedience.

Marital rape is another form of domestic violence that can find justification on the basis of *shari'a*. Although rape is a punishable crime in every Muslim society, nowhere is the criminal sanction extended to rape within marriage. Under *shari'a*, there is no harm and thus no crime in acts of sex between people who are married. Thus, marital rape is literally *uncriminalizable* under dominant interpretations of *shari'a*. For example, Sura 2, Verse 223

³⁶[36] Engineer, *The Rights of Women in Islam*, p. 47.

³⁷[37] Azizah al-Hibri, An Introduction to Muslim Women's Rights, in *Windows of Faith: Muslim Women Scholar-Activists in North America*, ed. G. Webb (Syracuse, NY: Syracuse University Press, 2000).

³⁸[38] Riffat Hassan, *Women's Rights and Islam: From the I.C.P.D. to Beijing* (Louisville, KY: NISA Publications, 1995), p. 12, c.f. Jonas Svensson, *Women's Human Rights and Islam: A Study of Three Attempts at Accommodation* (Lund, Norway: Lund Studies in History of Religions, vol. 12), p. 73.

provides a Quranic basis for men's unabridged sexual access to their wives. This verse stipulates that your wives are ploughing fields for you; go to your field when and as you like. Although other Quranic verses and *hadith* instruct men not to force themselves sexually upon their wives, these tend to be superseded or overshadowed by the principle of female obedience.³⁹[39] Indeed, a wife's refusal to have sex with her husband can be conceived as a defiance of her duties, and can give rise to accusations of disobedience, thereby triggering legalistic justification for beating.

Forced marriage is a form of psychological and emotional violence (with physically violent possibilities). Although the Quran does not expressly sanction this practice, the principles of male authority and female obedience create conditions in which women's subjugation to their guardians can enable men to impose their will on matters of marriage. While the Quran recognizes mature (post-pubescent) women's right to enter freely into marriage, their status as legal minors under the authority of male guardians undermines their freedom or ability to assert this right in the face of male opposition.

Within patriarchal societies in general, there is little normative acceptance of social, legal or sexual autonomy for women. On the contrary, women's options and behavior tend to be heavily regulated and restricted. In contexts where gender and family relations are governed by *shari'a*, wives have a *legal* duty to concede to male authority, as long as this authority is exercised in a manner compatible with *shari'a*, and as long as the male fulfills his own obligations within the relationship. If women should act in a way deemed deviant or disobedient, depending on the way in which *shari'a* is administered in a given context, punishment may be the prerogative of the state, or may be left to the discretion of members of the family or the community. But under either circumstance, Muslim women's vulnerability to violence is related to jurisprudential traditions and social understandings of male authority and female obedience, and this provides fertile ground for domestic violence to occur with near-total impunity for perpetrators.

Of course, Muslim women are not *uniquely* vulnerable to domestic violence. Nor are social attitudes about female obedience and masculine prerogatives to discipline and punish women uniquely Islamic. What is unique, or rather what is particular to the situation of Muslim women are rationalizations deriving from *shari'a*. Indeed, the problem of domestic violence in Muslim societies in many ways resembles its counterpart elsewhere, and so too do the difficulties in combating it, given the gender biases operative in all societies. These difficulties have given rise to efforts to develop an international legal framework for dealing with a problem that is global in scope and harmful to women everywhere.

Internationalizing the Struggle against Domestic Violence

In the 1980s, women's organizations around the world began campaigning for international recognition and prohibition of domestic violence as a human rights violation. In the 1990s, domestic violence became a major issue in a worldwide campaign to end violence against women, part of a larger ongoing effort to promote women's rights as human rights.

While these initiatives are important and commendable, their timing raises some troubling questions. Human rights were established in the aftermath of World War II through the promulgation of a new set of international laws universalizing the rights of human beings everywhere.⁴⁰[40] Violence that is, the horrors and suffering that occurred during WWII was the driving concern to stimulate this revolution in law.

Over the decades, there have been prodigious efforts and achievements to prohibit numerous forms of violence as human rights violations. What, then, explains the delay in recognizing and condemning domestic violence as a human rights violation? One key explanation derives from the vagueness and inconsistency of international law in regard to domestic relationships. There are three general factors at issue: 1) the state-centered nature of international law; 2) the enduring emphasis in human rights discourse and practice on civil and political

³⁹[39] See Dawoud El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (The Hague: CIMEL and Kluwer Law International, 1996); and Dawoud El Alami, *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco* (London: Graham & Trotman, 1992).

⁴⁰[40] For a history of human rights, see Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1991).

rights (i.e., public rights); and 3) deference to the family as a private domain. The delay in recognizing domestic violence as a human rights violation can be explained by the difficulty of framing abuses suffered by women at home into the conventional framework of international law. The distinction between public and private life in international law is one of the principal theoretical barriers to this effort. 41[41]

Although the Universal Declaration of Human Rights (1948) and other human rights instruments that came into force in the 1960s and 70s (e.g., the International Conventions on Civil and Political Rights, and Social, Economic and Cultural Rights) prohibit discrimination on the basis of sex, international law proved a weak resource for women. This weakness inspired women's rights activists to begin pressing to extend international law into the private sphere.

A major breakthrough was the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted by the United Nations General Assembly in 1979 and came into force in 1981. CEDAW often is described as the international bill of rights for women.^{42[42]} It clearly establishes the indivisibility of women's rights in public and private life,^{43[43]} and brings violations by individuals within the purview of international law, at least indirectly, by making states responsible for the actions of private parties (article 2). Ratification or accession to CEDAW obligates states to abolish all forms of discrimination against women. While CEDAW recognizes the importance of culture and tradition in shaping gender roles and family relations, it imposes upon states the obligation to take all appropriate measures to modify social and cultural patterns of conduct that are discriminatory or harmful toward women.

Despite the gains that CEDAW represents, it has some serious limitations. It does not *explicitly* identify violence against women as a human rights violation. And it has even less enforcement power than most other human rights treaties.^{44[44]} The Committee that administers CEDAW is limited to taking reports from state parties about their efforts to implement its requirements, and issuing recommendations. But the most glaring limitations derive from the reservations that many states have attached to their ratification or accession to CEDAW. Although CEDAW is the second most widely ratified human rights treaty (after the Convention on the Rights of the Child), it is the one with the most reservations.

To redress the limitations of CEDAW on matters of violence against women, in the 1980s women's rights groups began a worldwide campaign to make freedom from domestic and other forms of violence a universally recognized human right.^{45[45]} In 1985, the final document of the UN Third World Conference on Women (held in Nairobi, Kenya) affirmed the seriousness of violence against women and the need for international measures to combat it.

In 1992, the Committee for CEDAW issued General Recommendation Number 19, which holds that gender-based violence is a form of discrimination that states must take measures to eradicate. In 1993, women's groups presented a petition with almost 500,000 signatures from 128 countries to delegates at the World Conference on Human Rights (Vienna), demanding the recognition of violence against women as a violation of their rights.^{46[46]}

41[41] Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in Julie Peters and Andrea Wolper, eds., *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995), p. 127.

42[42] As of April 1, 2000, CEDAW had been ratified or acceded to by 165 states. Only 17 states had *not* ratified or acceded to CEDAW, but of these, 11 have majority Muslim populations: Afghanistan, Bahrain, Iran, Mauritania, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, and the United Arab Emirates. *The World's Women 2000: Trends and Statistics* (NY: United Nations, 2000), pp. 151-52. Since then, Saudi Arabia has signed.

43[43] See Susana Fried, ed., *The Indivisibility of Women's Human Rights: A Continuing Dialogue* (New Brunswick, NJ: Center for Women's Global Leadership, 1994).

44[44] Jean Zorn, *Women's Rights Are Human Rights: International Law and the Culture of Domestic Violence*, in Dorothy Ayers Counts, Judith Brown, and Jacquelyn Campbell, eds., *To Have and To Hit: Cultural Perspectives on Wife Beating*, 2nd edition (Urbana and Chicago: University of Illinois Press, 1999), p. 288-89.

45[45] Zorn, *Women's Rights Are Human Rights*, p. 289.

46[46] *Ibid.*

Also in 1993, the UN adopted the Declaration on the Elimination of Violence against Women, defining it as any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. This Declaration explicitly includes violence occurring in the family, including wife battering and marital rape.

In 1994, the UN appointed Radhika Coomaraswamy to serve as the first Special Rapporteur on Violence against Women. The Rapporteur's role is to build on and extend UN initiatives. Her mandate includes domestic violence and, more generally, promotion of adherence to all international instruments and treaties establishing women's rights as human rights.

In 1995, the Beijing Platform of Action (issued at the conclusion of the Fourth World Conference on Women) included an affirmation of the need to combat domestic violence.⁴⁷[47] More than any previous initiative, the Beijing Platform articulates a clear set of factors that perpetuate domestic violence,⁴⁸[48] all of which governments are expected to remedy.⁴⁹[49] It also identifies the lack of information and statistical data about domestic violence as an obstacle to combating it. This inspired the World Health Organization (WHO) to establish a database on violence against women and develop a questionnaire and guidelines for undertaking national surveys, although this process is still in its nascent stages.⁵⁰[50]

In 1999, the UN adopted an Optional Protocol to CEDAW, which allows individual women or groups of women (from signatory states) who have exhausted domestic remedies to petition the Committee for CEDAW about violations of the Convention by their governments. This Protocol also grants the Committee the authority to conduct inquiries into grave or systematic abuses of women's human rights in states that are party to the Convention and the Protocol.⁵¹[51]

Coomaraswamy has taken a leading role in formulating and promoting legal rationales to clarify states responsibilities to prohibit and combat domestic violence in accordance with their international obligations.⁵²[52] The two major legal doctrines identified for these purposes are:

- 1) The doctrine of state responsibility and due diligence: States have an internationally recognized responsibility and obligation to exercise due diligence to prevent, investigate and punish acts by private actors that constitute violations of human rights. Moreover, where a state fails to assume this responsibility, it is complicit in the violations committed by private actors. Complicity includes pervasive non-action. State responsibility includes the institution of effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against domestic violence; preventive measures, including public information and education

⁴⁷[47] For an example of the way the Beijing Platform has been utilized by activists who work on or in Muslim societies, see Mahnaz Afkhami, Greta Hofmann Nemiroff and Haleh Vazeri, *Safe and Secure: Eliminating Violence against Women and Girls in Muslim Societies* (Bethesda, MD: Sisterhood Is Global Institute, 1998).

⁴⁸[48] The factors identified in the Beijing Platform of Action include: social pressures, notably the shame of denouncing certain acts that have been perpetrated against women; women's lack of access to legal information, aid or protection; the lack of laws that effectively prohibit violence against women; failure to reform existing laws; inadequate efforts on the part of authorities to promote awareness of and enforce existing laws; and the absence of educational and other means to address the causes and consequences of violence (Section D, Paragraph 118).

⁴⁹[49] Measures identified in the Beijing Platform of Action for governments to institute include: condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations; exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether these acts are perpetrated by the state or by private persons (Section D, Paragraph 124).

⁵⁰[50] *The World's Women 2000*, op. cit., p. 157. The internet address for the WHO database on violence against women is: www.who.int/violence_injury_prevention/

⁵¹[51] As of April 2000, only three countries with predominantly Muslim populations have signed the Protocol: Ghana, Senegal and Indonesia.

⁵²[52] Radhika Coomaraswamy, *Combating Domestic Violence*, op. cit.

programs to change attitudes that contribute to the perpetuation of domestic violence; and protective measures to assist women who are victims or at risk of domestic violence.

- 2) The doctrine of equal protection of the law: International law imposes a duty on states not to discriminate on a number of specified grounds, including sex/gender. Failure to fulfil this duty constitutes a violation of international law by the state. This means that states must apply and enforce the same criminal sanctions and punishments in cases of domestic violence as are applied to any other types of inter-personal violence. Any pattern of non-enforcement amounts to unequal and discriminatory treatment on the basis of sex/gender.⁵³[53]

The emphasis of these two doctrines clearly links gender inequality and domestic violence, and the obligations of states to combat both. These linkages are based on the following assumptions and principles: 1) gender violence is a form of discrimination, and as such, violates international human rights standards which all states are obligated to adhere to in their own practices and to enforce within all relationships (public and private) within their jurisdiction; 2) women have a right to equality with men, and this encompasses all relationships, including those of the family; 3) local laws that sanction gender inequality must be reformed to provide equal protections for women and men, and enforcement must be non-discriminatory.

The development of an international legal framework for women's rights as human rights has contributed to the mobilization of an international struggle against domestic violence.⁵⁴[54] Such efforts have heightened and focused international concern about the rights of women in their relations with family members. Making international standards of rights a reality for women around the world, though, is an ongoing and difficult project. It entails bringing local legal regimes into conformity with international law. And it entails reform of social attitudes to recognize the legitimacy of women's rights and a need for laws and other measures to protect them from violence.

Cultures of Resistance, Or Saying No to Universalism

The successes in defining and promoting women's rights, including the prohibition of domestic violence as a human rights violation has generated criticism and reprisals. Social conservatives around the world have responded negatively to efforts to empower women and endow them with enforceable rights within the family, charging that such initiatives constitute an assault on family values, traditions, national cultures, and so on. In many societies, official and popular aversion to enforcing international standards for domestic relationships is far more powerful and influential than the forces seeking to promote and protect the rights and well-being of women.

The promotion of women's rights as human rights, and the recent declarations and conventions to internationalize and standardize those rights have become imbricated in raging debates over the legitimacy of human rights in general. Indeed, the rights of women constitute the quintessential challenge to the 'universality' of human rights. These debates have been particularly vigorous in many developing countries. Critics and opponents argue that international legal standards contravene local customs and cultures and/or religious beliefs and practices. Indeed, the emphasis on individuals as rights-bearing subjects, and the tendency to prioritize political and civil rights over social, economic and cultural rights lend weight to arguments that human rights are 'Western' and (thus) alien.⁵⁵[55] Such arguments are bolstered by the history of human rights; the majority of contemporary states were,

⁵³[53] A third doctrine equating domestic violence with torture and cruel, inhuman and degrading treatment is being promoted by some feminist legal and human rights experts. Their aim is to bring the force and remedy of laws prohibiting torture to bear on domestic violence. The prohibition against torture is one of the strongest principles of international human rights law, since it is absolutely non-derogable under any circumstances. The prohibition against torture has acquired the status of customary law, which means that the power to enforce it and punish perpetrators is extra-territorial. In other words, the courts of any state can be used to try perpetrators if their own state fails to do so. Those who advocate the equating of domestic violence with torture argue that the practices have four common elements: a) both cause severe physical and/or mental pain, b) both are intentionally inflicted, c) both are utilized for specified purposes, and d) both entail some form of official involvement, whether direct or tacit. However, this doctrine transforms (some would argue misconstrues) the international legal definition of torture, which hinges on the perpetration of violence by a *public authority* against people *in custody*.

⁵⁴[54] See Charlotte Bunch and Niamh Reilly, *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights* (New Brunswick, NJ: Center for Women's Global Leadership, Rutgers University and United Nations Development Fund for Women, 1999); Susana T. Fried, ed., *The Indivisibility of Women's Human Rights: A Continuing Dialogue* (New Brunswick, NJ: Center for Women's Global Leadership, Rutgers University, 1994).

⁵⁵[55] See Partha Chatterjee, Religious Minorities and the Secular State: Reflections on an Indian Impasse, *Public Culture*, vol. 8 (1995); Fred Halliday, Relativism and Universalism in Human Rights: The Case of the Islamic Middle East, *Political Studies*, vol. 43 (1995); Rhoda

at the time human rights were created, still colonized by European powers and thus did not participate in the early stages of establishing a framework for human rights.

Resistance to the applicability of international law can not be understood merely as a regressive reaction to change. Rather, it must be understood as a *relational response* to historic conditions and globalization. The creation (and continuing expansion) of human rights is one manifestation of the globalization of distinctly modern legal norms and political relations. In broad terms, this process of globalization includes the establishment of modern (sovereign, bureaucratic) states, which had, by the latter decades of the 20th century, become virtually universal (albeit continuously subject to local demographic and territorial shifts and challenges). Globalization also includes the articulation of increasingly detailed standards and norms of government that apply, at least in principle, to all states.

The internationalization of a common set of rights for all human beings has provoked a great deal of anxiety about cultural homogenization, especially in societies in the Middle East, Africa and Asia. To the extent that human rights are *perceived* as a Western construct, their legitimacy in non-Western societies is debatable. Moreover, the requirement to reform local laws and to transform local social and political relations to conform to international law is widely construed as a manifestation of enduring Western hegemony, a neo-imperial twist on a centuries-old global power dynamic in which values and norms are articulated and spread uni-directionally from the West to the rest.⁵⁶[56]

Women rights, and the issue of gender relations more generally, have become the primary redoubts of these anxieties about cultural and legal imperialism. While certain aspects of modernity, such as national security and bureaucratization, have been embraced by states everywhere, the politics of culture specifically cultural difference have marked women as a terrain for preserving that which is (imagined to be) particular to a given society. In the colonial era, women were made the principle targets for social transformation by Western administrators and Christian missionaries (i.e., the civilizing mission). Modernizing reformers from these societies also targeted women as objects for intervention and change, whether to accommodate the imperatives of colonial administrations or to justify demands for self-rule. These variants of colonial feminism made the liberation of women both a means and a goal of modernization. According to Deniz Kandiyoti, this created a close association in the minds of many Muslims between the (changing) status of women and cultural imperialism, and sparked countervailing attempts to maintain and reinforce authentic relations and roles for women to resist such imperialism.⁵⁷[57]

Islamic authenticity may therefore be evoked to articulate a wide array of worldly disaffections, from imperialist domination to class antagonisms. This opens up the possibility of expressing such antagonisms in moral and cultural terms, with images of women's purity exercising a powerful mobilising influence.⁵⁸[58]

When women are treated as markers of cultural authenticity, and when cultural discourses posit that women's human rights are an alien concept, part of a cultural onslaught emanating from 'elsewhere,' the disadvantages that women experience *as women* can be justified and defended—even glorified—as an aspect of that particular culture. Conversely, when the promotion of women's rights is read as a sign—and imperative—of modernization (by vesting women with individual and inalienable rights), and when this goal demands the revision or

Howard, Group versus Individual Identity in the African Debate, in *Human Rights in Africa: Cross-Cultural Perspectives*, eds. Abdullahi An-Na'im and Francis Deng (Washington, DC: The Brookings Institution, 1990); R. Panikkar, Is the Notion of Human Rights a Western Concept *Diogenes*, no. 120 (Winter 1982); Bassam Tibi, Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations, *Human Rights Quarterly*, vol. 16 (1994); idem., The European Tradition of Human Rights and the Culture of Islam, in *Human Rights in Africa*, op. cit.

⁵⁶[56] For a discussion of the implications of this on women, see Chandra Talpade Mohanty, Under Western Eyes: Feminist Scholarship and Colonial Discourses, in *Third World Women and the Politics of Feminism*, eds. Mohanty, Ann Russo and Lourdes Torres (Bloomington, IN: Indiana University Press, 1991).

⁵⁷[57] Deniz Kandiyoti, Introduction, in *Women, Islam and the State*, ed. Kandiyoti (Philadelphia: Temple University Press, 1991), p. 7.

⁵⁸[58] *Ibid.*, p. 8.

revocation of local laws and practices, then it often provokes countervailing efforts to resist globalization and foreign influence by defending that which is (deemed) authentic and particular to a given culture or society.⁵⁹[59]

Whether state agents are the authors of such resistance, or are pushed in these directions by powerful constituencies, it is the state as both the arbiter of law and the representative of society in the international legal order that bears primary responsibility for the provision and enforcement of rights for its subjects. The struggles over women's rights are, in many ways, contestations over legal jurisdiction and authority, namely whether international legal standards will prevail to guide state policy, or whether other bodies of law (constitutional, religious, customary) are accorded precedence when there is a contradiction.

Although resistance to women's rights is strong, it rarely manifests itself as an open *defence* of violence against women as a cultural value or end in its own right (possible exceptions being female genital cutting and *sat* ⁶⁰[60]). More commonly, concern about the safety and well-being of women is subordinated to other values or ends, including social stability, male superiority, and, in some contexts, adherence to religion and/or tradition. But if this serves to *enable* practices that constitute domestic violence, whether by tolerating or ignoring them, it literally sacrifices women to some other social good. There is or should be an understood difference between the perpetration of violence against women *because of culture* (i.e., for reasons related to cultural ideologies and relations) and the conflation of this violence *with the culture itself*. As Jean Zorn points out:

If wife beating occurs in almost every society in the world, if it is almost universal, then can it be said to be part of any society's unique culture? It is certainly not what sets that society apart from all others, that which gives the society its special character. One could argue that, even if international law should recognize cultural differences, universally applicable rules of international law may govern any behavior that is itself all but universal.⁶¹[61]

In societies where resistance to women's rights is expressed as a defence of social traditions and/or religious norms, women's rights activists have been challenged to cultivate a persuasive distinction between culture and violence against women. Disrupting tacit tolerance for practices that constitute domestic violence requires efforts to make such practices visible *as violence*, to de-legitimize justifications for the use of violence by bringing culturally relevant arguments to bear in the defence of women's safety and wellbeing, and to challenge laws, jurisprudence and ideologies that construe such practices as vital to the greater good of society.

Shari'a and (versus) Women's Rights

In Muslim societies, there is a pervasive belief that international standards for women's rights conflict with *shari'a*. This extends to the idea that women's human rights and efforts to promote them are un-Islamic or even anti-Islamic. Thus, resistance (official and popular) to reform *shari'a*, whose sources are regarded as divine, in order to accommodate international legal standards can be justified as a refusal to sacrifice or subordinate the sacred to the secular.

What this reflects is not an unyielding or inflexible commitment to religion per se, but a *responsive* influence of conservative ideologies and interpretations of religious prescriptions about gender and family relations in the face of sweeping social transformations that characterize modernization.

⁵⁹[59] See Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, CT: Yale University Press, 1992); Patricia Jeffrey and Amrita Basu, eds., *Appropriating Gender: Women's Activism and Politicized Religion in South Asia* (New York: Routledge, 1998).

⁶⁰[60] See Lata Mani, Contentious Traditions: The Debate on Sati in Colonial India, in *Recasting Women: Essays in Colonial History*, eds. Kumkum Sangari and Sudesh Vaid (New Delhi: Kali for Women, 1989); Christine Walley, Searching for Voices: Feminism, Anthropology and the Global Debate over Female Genital Operations, *Cultural Anthropology*, vol. 12, no. 3 (1997).

⁶¹[61] Zorn, Women's Rights Are Human Rights, op. cit., pp. 292-93.

Although Islamic rules have been reinterpreted, modified, or simply treated as inapplicable when dealing with changing circumstances in such issues as slavery and modern commercial practices, no such flexibility has been shown with regard to women's rights. For women, the trend of interpretation has worked almost exclusively in the opposite direction.⁶²[62]

The trend toward more conservative positions on gender issues can be traced through Muslim governments participation in the international process to develop a legal framework for women's rights. This process has highlighted and sharpened differences over women's *right to rights*. In recent years, Muslim governments have consolidated their commitment to *shari'a* in direct response to pressures to incorporate international legal standards locally. This history reveals the fluidity of ideologies about rights and law.

In 1963, the countries that sponsored a resolution calling for the preparation of a Declaration on the Elimination of Discrimination against Women (the precursor to CEDAW) included Afghanistan, Algeria, Indonesia, Morocco and Pakistan.⁶³[63] The UN Secretary General, pursuing the resolution's request for comments and proposals about the contents of such a Declaration, received responses from Afghanistan, Egypt, Iraq, Morocco, Sudan, Syria and Turkey, all of which were supportive of the idea of women's rights. For example, Afghanistan recommended that intense educational efforts be made to combat traditions, customs and usages which thwart the advancement of women. ⁶⁴[64] Egypt's response called for educational campaigns to overcome discriminatory customs and traditions.⁶⁵[65]

During the process of drafting the Declaration, a controversy arose over whether it should call for the *abolition* or the *modification* of customs and laws that perpetuate discrimination. This presaged the kind of controversy that would arise around the drafting and passage of CEDAW. But because the Declaration was just that a statement lacking contractual force it was passed unanimously. The drafting of CEDAW was a more difficult process, with a full week spent debating articles 15 and 16, which give women equal capacity before the law, and equality under marriage and family law.⁶⁶[66] When the draft Convention was voted upon, most of the abstentions on these articles came from Muslim countries. In the final vote, the Convention passed 130 to 0, with 11 abstentions, including Bangladesh, Djibouti, Mauritania, Morocco and Saudi Arabia.

CEDAW was opened for signatures in 1980. Most of the countries with majority Muslim populations that have signed CEDAW have entered reservations.⁶⁷[67] And all of the reservations except those of Indonesia, Turkey and Yemen (former Democratic Republic of Yemen) relate to the preservation of *shari'a* in matters of personal status.⁶⁸[68] But the reservations themselves vary in scope, terms and specificity. For example, Libya proclaimed

⁶²[62] Asma Mohamed Abdel Halim, Tools of Suppression, in *Gender Violence and Women's Human Rights in Africa*, op. cit., p. 28.

⁶³[63] Jane Connors, The Women's Convention in the Muslim World, in Yamani, ed., *Feminism and Islam*, op. cit., p. 353.

⁶⁴[64] Cited in Connors, The Women's Convention in the Muslim World, p. 353.

⁶⁵[65] Ibid.

⁶⁶[66] Ibid., p. 354.

⁶⁷[67] This comparative discussion of reservations to CEDAW draws from Connors, The Women's Convention in the Muslim World.

⁶⁸[68] The reservations of Indonesia and Yemen pertain to article 29(1) which allows reference of any dispute over the Convention to the International Court of Justice. Turkey's reservations include article 29(1) as well as various paragraphs of articles 15 and 16 according women legal capacity identical to that of men in certain family matters. Connors, The Women's Convention in the Muslim World, pp. 354-55.

that its accession to CEDAW is subject to a sweeping general reservation of any provisions that conflict with personal status laws derived from *shari'a*. Bangladesh reserved on article 2, the core of the treaty, on the grounds that it conflicts with *shari'a*. Egypt and Morocco entered reservations similar to Bangladesh, but couched in a different language, namely stating a willingness to comply with article 2 as long as it does not conflict with *shari'a*.

As a matter of explanation, Morocco add[ed] that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic *shari'a*, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.⁶⁹[69]

Most of the reservations by Muslim countries pertain to article 15, which grants women equality with men before the law, and article 16, which requires states to eliminate discrimination against women in matters of marriage and family relations.⁷⁰[70] Article 16, along with article 2, constitutes the crucial core of the Convention because it addresses relations and rights in the private sphere, which is the fundamental site of discrimination against women which, effectively, sets the framework and opportunity for discrimination in public life.⁷¹[71] Bangladesh, Egypt, Iraq, Jordan, Morocco, Tunisia and Kuwait all entered reservations to article 16. While some of these countries did not elaborate on their reasons for reserving, Egypt, Iraq, Jordan and Morocco offered explanations that women are advantaged by the domestic legal regime (e.g., through payment of a dower, and men's obligations to support their wives financially). For example, Egypt's explanation states that the basis of spousal relations under *shari'a* is equivalency of rights and duties so as to ensure complimentary which guarantees true equality between spouses, not quasi-equality that renders the marriage a burden on the wife.⁷²[72]

The substance and scope of reservations by Muslim countries sparked a great deal of controversy. Some countries, notably Mexico, Germany and the Nordic states, protested that the reservations are incompatible with the principles and provisions of the Convention as a whole.⁷³[73] Sweden was the most adamant, issuing a statement that such reservations

would render a basic international obligation of a contractual nature meaningless. Incompatible reservations not only cast doubts on the commitments of the reserving States to the object and purpose of the Convention, but also contribute to undermine the basis of international contractual [i.e., treaty] law.⁷⁴[74]

Such objections raised the issue of reservations for international discussion. This, in turn, generated counter-objections by reserving states that such discussion amounted to an attack by the West on, first, the Islamic world and, by extension, the whole of the Third World.⁷⁵[75] These discussions about reservations continued in various sessions and committee meetings of the UN. Although Muslim governments were not the only ones to enter

⁶⁹[69] Connors, *The Women's Convention in the Muslim World*, p. 356.

⁷⁰[70] The provisions of article 16 would equalize men's and women's rights on matters of entering into and dissolving marriages, custody, inheritance, right to work, and control over family decisions and resources. This article also prohibits child marriage and requires states to establish and enforce a minimum age of marriage, and to make registration of marriage compulsory.

⁷¹[71] Connors, *The Women's Convention in the Muslim World*, p. 358.

⁷²[72] Cited in *ibid.*, p. 359.

⁷³[73] Note that the Convention on the Elimination of Racial Discrimination allows a vote (two-thirds) by other parties to declare a state's reservations incompatible with the object of the Convention.

⁷⁴[74] Cited in Connors, *The Women's Convention in the Muslim World*, p. 360.

⁷⁵[75] *Ibid.*, p. 361.

reservations, their reservations articulated a common theme about the precedence of *shari'a*, leading to a general sense that the controversy was a debate about Islam.

Following the submission of Bangladesh's first report to the Committee for CEDAW, and no doubt influenced by the contents of that report, the Committee formulated General Recommendation Number 4 expressing concern about the significant number and potential incompatibility of reservations as they affect the object and purpose of the Convention. The Committee also requested the UN to promote or undertake studies on the status and equality of women in the family taking into consideration the principle of *El Ijtihad* [sic] in Islam.⁷⁶[76] In response, Bangladesh as well as Egypt charged that this amounted to cultural imperialism and religious intolerance. Such a charge resonated with other Third World countries, not only those with majority Muslim populations. This led to the passage of a UN resolution squelching the Committee's proposal for studies about women in Islam. According to Ann Mayer,

The result was that, faced with appeals to cultural particularism, the UN tolerated a situation where some countries would be treated as parties to a convention whose substantive provisions they had professed their unwillingness to abide by. Implicitly, the UN acquiesced to the cultural relativist position on women's rights, allowing parties to CEDAW to invoke Islam and their culture as the defence for their non-compliance with the terms of the convention. This was paradoxical, since CEDAW was premised on the notion that, where cultural constructs of gender were an obstacle to the achievement of women's equality, it was culture that had to give way not that women's rights should be sacrificed.⁷⁷[77]

Islamic resistance to international human rights law condensed around CEDAW in particular, and women's rights in general.⁷⁸[78] In 1990, the Organization of Islamic States, to which all Muslim countries belong, issued a collective rejoinder to international efforts to establish women's rights in the domestic sphere as human rights: The *Cairo Declaration on Human Rights in Islam* established that all rights were subject to Islamic law, and that where there was a contradiction between international law and *shari'a*, the latter would take precedence.

The assertion on the part of governments that religious beliefs and jurisprudence justify the disregard for international legal standards illustrates persisting and onerous obstacles to women's rights. On the one hand, the sovereign prerogatives of states *do* provide for autonomy and independence on the legal character of rights within a country. On the other, the international nature of human rights standards and the jurisdiction of international law obligate states to conform under the doctrine of state responsibility. Indeed, *to be a state* is to be legally subject to the requirements and restrictions enshrined in international law. Abdullahi An-Na'im argues that the most effective means of reconciling state sovereignty and local culture with international legal standards entails the cultivation of a broader and deeper 'overlapping consensus' on the universal cultural legitimacy of human rights, including women's rights.⁷⁹[79]

???????????In exercising their sovereign prerogatives, Muslim governments have sought to present themselves as defenders of 'Islam' by building a firewall around *shari'a*. On the international level, despite the controversy that this has provoked, it epitomizes the capacity of states to speak and act in the name of their societies. Indeed, such a conflation is characteristic of the state-centric international order. Moreover, criticisms of Muslim

⁷⁶[76] Report of the Committee on the Elimination of Discrimination against Women, Sixth Session, 42 UNGAOR Supp (No. 38), para. 583, UN Doc. A/42/38 (1987), cited in Connors, *The Women's Convention in the Muslim World*, p. 362.

⁷⁷[77] Ann Mayer, *Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience*, in Peters and Wolper, eds., *Women's Rights, Human Rights*, op. cit., p. 179.

⁷⁸[78] The Committee for CEDAW has persisted in seeking to minimize the impact of reservations based on *shari'a*. In 1994, the Committee revised its Guidelines for the preparation of country reports, recommending that states that have entered reservations should explain why they consider such reservations necessary, how they impact upon national law and policy, and how reservations to this Convention compare to reservations (or lack thereof) to other human rights treaties that guarantee similar rights.

⁷⁹[79] See Abdullahi An-Na'im, *State Responsibility under International Human Rights Law to Change Religious and Customary Laws*, in Rebecca Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994).

governments policies by others, be they representatives of foreign governments or international organizations, can further entrench resistance to human rights within those societies.

But does such a stance actually represent a Muslim consensus. There is a substantial, albeit still marginal, discourse *within* Muslim societies that questions the putative incompatibility of Islam and women's human rights, and, by extension governmental positions that assume that they are irreconcilable. This alternative discourse includes efforts to reinterpret elements of *shari'a* to provide for more egalitarian gender relations, and the censure or prohibition of practices that harm or disadvantage women.

Yet the degree to which this discourse can get a public hearing or impact upon national policy is limited by governments themselves. Many governments have acted to repress scholars, activists and organizations advocating women's rights, even when such advocacy seeks to show their compatibility to Islam. Najla Hamadeh describes this as the authoritarian discourse of silence, which produces a sterile juridical monologue.⁸⁰[80] The *effect* is to reify religion by conflating Islam with government positions. The *means* entails the use of state power to stifle and preclude dissenting views or alternative interpretations of religion. But the problem of politically authoritarian states, which characterize the majority of regimes across the three regions, is perpetuated even bolstered by their capacity to use religion (albeit in varying ways, as elaborated in the following section) to justify the lack, restriction or even outright violation of rights of women.

Shari'a, the State and Domestic Violence

The propagation of a collective trans-national and official position on the incompatibility of women's rights and Islam belies variations in the role and uses of *shari'a* within Muslim societies, as well as differences between the three regions. To understand these variations, the most crucial issue is the relationship between religion and the state. In any given country, this relationship is informed by the particular history of state formation and development, as well as the demographic composition of the population. In the Middle East, Muslims comprise a majority of the population in every country except Israel. Islam is the dominant religion across the region, and most Middle Eastern governments identify it as the official religion. In sub-Saharan Africa and Asia, Muslims comprise majorities in some countries, whereas in others Muslim populations co-exist with populations of other religions.

In Muslim societies in sub-Saharan Africa, more so than the other two regions, isolating the role of *shari'a* from other bodies of law (customary, colonial and national) is difficult because the spread of Islam was a gradual process, in many places combining syncretically with local customs and cultures. Another regional distinction is that all the sub-Saharan African countries that *have* signed CEDAW have done so without entering reservations. However, such willingness has not, generally, translated into a more activist stance by African governments on matters of women's rights. In all three regions, family and social relations are patriarchal, and *shari'a* has tended to bolster these arrangements.

It may well be that restrictions imposed by Islamic and other forms of customary laws are reinforced and magnified by state structures that institutionalize both Western and indigenous elements of patriarchy. All these elements come together to disadvantage women vis-à-vis men. These disadvantages exist in all societies. The degree and type of disadvantage differs from culture to culture but the fact of disadvantage is universal and certainly not unique to Islamic societies.⁸¹[81]

One way of engaging a comparative approach to the relationship between domestic violence and *shari'a* is to highlight variations in the relationship between religion and the state. This relationship can be divided into three broad categories: 1) Communalization: religious laws, institutions and authorities are accorded semi-autonomy from the state; 2) ?Nationalization?: religious laws and jurisprudence are incorporated into or influential over the state's legal regime; and 3) ?Theocratization?: the state bases its own authority upon religious law and jurisprudence.

⁸⁰[80] Najla Hamadeh, *Islamic Family Legislation: The Authoritarian Discourse of Silence*, in Yamani, ed., *Feminism and Islam*, op. cit., p. 346.

⁸¹[81] Barbara Callaway and Lucy Creevey, *Women and the State in Islamic West Africa*, in *Women, the State and Development*, eds. Sue Ellen Charlton, Jana Everett and Kathleen Staudt (Albany: SUNY Press, 1989), p. 8.

Communalization: In countries where separate systems of personal status laws are applied to members of different communities, there are two tiers of law, one under the direct control of the state, and the other based on religion (and/or custom) and semi-autonomous from the state's legal authority. In such contexts, laws and legal institutions governing family relations are not only legally separate from state law, but also are regarded *ideologically* as outside the state's domain.

Israel, India and Nigeria represent examples of countries where personal status laws are communalized. In all three, the populations are religiously diverse, the national political systems are non-religious, and each has a constitutionally-based legal system.⁸²[82] In Israel, communalization works to provide every religious group (Jews, Christians, Muslims, Druze) with its own personal status laws administered by religious authorities,⁸³[83] whereas in India, communalization applies only to minorities, not the Hindu majority. In Nigeria, sectarian law is administered under the rubric of regional states (rather than communalization on a national scale).

In Israel and India, this two-tiered system was instituted as part of a broader project of national integration to accommodate religious and social differences and encourage loyalty to or dependency on the state by religious authorities and constituencies; communal autonomy over domestic matters formed an element of the social contract in these countries. In Nigeria, communalization and more specifically Islamization is of a more recent vintage. But in all three, communalization of personal status laws serves to deprive women of equal *citizenship rights*. This extends to the issue of domestic violence by impeding or preventing victims from seeking protection from the state, since what occurs in the family is *legally constructed* as a communal issue, not the state's concern.

In India, the administration of *shari'a* is overseen by the All India Muslim Personal Law Board. Communal autonomy has been the subject of debate since independence, challenged by those who advocate a uniform civil code for personal status issues that would apply to all Indians regardless of religion. The debate heated up in 1985 following the notorious Shah Bano case. The Indian Supreme Court ruled that Shah Bano, a divorced Muslim woman, had the right to receive maintenance from her husband under Section 125 of the Criminal Procedure Code of India. This provoked conservative Muslim religious leaders and the All India Muslim Personal Law Board to protest state interference in a communal matter. The Indian government capitulated to the pressure and passed a new law (the Muslim Women [Protection of Rights in Divorce] Act) negating the court ruling and fortifying the authority of Islamic law and the authority of religious institutions.⁸⁴[84]

In India (like other South Asian countries), estimated rates of domestic violence tend to be among the highest in the world. Experts and activists explain this by emphasizing the link between violence against women and low socio-economic status, which characterizes the situation for the vast majority. While poverty itself is not *causal* for violence against women, it can increase women's vulnerability. For example, one form of domestic violence that is pervasive in South Asia, but particular to that region, is bride burning. This refers to the killing of women (often staged as a kitchen accident) for their failure or inability to provide additional dowry resources to the husband's family. Although the origin of this phenomenon is rooted in Hindu practice, it has spread to Muslim communities in India as well as Pakistan and Bangladesh. In India, the parliament passed a law criminalizing bride burning and other forms of dowry-related harassment in 1983 (supplementing a 1961 law). However, the communalization of *shari'a* has left Muslims beyond the reach of these state interventions, including criminal sanctions, for dowry-related violence and murder; the Dowry Prohibition Act (1986) exempts persons to whom Muslim Personal Law (Shariat) applies.

In Nigeria, the role of *shari'a* has been undergoing a rather dramatic transformation in recent years connected to political transition in the country.⁸⁵[85] The replacement of Muslim military leaders with non-Muslims in

⁸²[82] While India and Nigeria have a constitution, Israel does not. However, Israel has a set of Basic Laws that provide a constitutional framework for government.

⁸³[83] See Barbara Swirski, The Citizenship of Jewish and Palestinian Women in Israel, in *Gender and Citizenship in the Middle East*, ed. Suad Joseph (Syracuse, NY: Syracuse University Press, 2000).

⁸⁴[84] See Kirti Singh, Obstacles to Women's Rights in India, in *Human Rights of Women*, ed. Rebecca Cook, op. cit; Radha Kumar, Identity Politics and the Contemporary Indian Feminist Movement, in *Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective*, ed., Valentine Moghadam (Boulder, CO: Westview Press, 1994).

⁸⁵[85] See Ayesha Imam, Politics, Islam, and Women in Kano, Northern Nigeria, in *Identity Politics and Women*, ed. Moghadam, op. cit.

the national government inspired efforts to Islamicize northern states with large Muslim populations. The primary manifestation of this has been the enforcement of *shari'a*.

In Nigeria, the issue of domestic violence is bound up in cultural notions of masculine privilege, which conservative interpretations of *shari'a* reinforce.⁸⁶[86] One study found that 31 percent of women have been subjected to physical abuse at least once in their lives.⁸⁷[87] A study surveying rates of domestic violence between 1982 and 1988 found an upsurge in the practice, with a total of 1220 women reporting battery over this period.⁸⁸[88] But it is unclear whether this indicates an increase in incidents of violence or women's willingness to report it. A 1997 study found that domestic violence is common in all regions and spans all social classes and groups.⁸⁹[89]

On the national level, the Nigerian constitution guarantees equal rights to all citizens, including clauses that bar discrimination on the basis of sex. Nigeria has ratified, without any reservations, CEDAW and other human rights instruments that guarantee women's rights. However, the government has not instituted laws explicitly prohibiting domestic violence, and officials generally tend to be unwilling to enforce criminal laws in cases of intra-family violence. [GET A REFERENCE FROM NGONE]

Shari'a and the Northern Nigerian Penal Code reinforce the permissibility of domestic violence and the legal impunity of perpetrators: Section 55 of the Penal Code provides that

wife beating is permitted in so far as it does not amount to grievous injury nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done by a husband for the purpose of correcting his wife, such husband or wife being subject to any native law or custom in which such correction is recognized as lawful.⁹⁰[90]

Likewise, under the penal code marital rape is effectively permissible because it is unrecognized as a crime.

In Nigeria, official tolerance of domestic violence is further reinforced by a lack of social services and assistance for victims. For example, in one study an official at the Social Welfare Office described that institution's mandate as 'palliative and ameliorative rather than judgmental' [Officials try to appease both parties.] He continued by reminding the interviewer that

the culture allows men to beat women. [Social Welfare Office officers] ask [women who report violence] if they are submissive to their husbands, or if they think their husbands are in a position to reprove them. When answers to these questions are not straightforward or forthcoming, [the officers] ask the couple to settle their differences 'in bed.'⁹¹[91]

⁸⁶[86] See Milkah Elam Bukurta, *Pattern of Wife Abuse within Families in Yola Adamawa State* Nsukka, MA thesis, Department of Vocational Teacher Education, University of Nigeria, November 1998; Peter Chukwama Ezeah, *Socialization, Social Class and Marital Violence: A Study of Wife Abuse in Nsukka Local Government Area, Enugu State* Nsukka, MA thesis, Department of Sociology/Anthropology, University of Nigeria, 1993; Albert Olawale, *Women and Violence in Kano, Nigeria* (Spectrum Books, Ltd., 1996).

⁸⁷[87] O. Odujinrin, *Wife battering in Nigeria*, *Journal of Gynecology and Obstetrics*, no. 41 (1993), cited in *The World's Women 2000*, op. cit., p. 154.

⁸⁸[88] F. Omorodion, *The Social Context of Wife Battering*, in *Unequal Rights: Discriminatory Laws and Practices against Women in Nigeria*, ed., Josephine Effah et al., 1995. [NGONE: need full cite]

⁸⁹[89] Morayo Atinmo, *Sociocultural Implications of Wife Beating in Nigeria*, *Men, Women and Violence* (CODESRIA Gender Institute, 1997).

⁹⁰[90] Cited in Effah, *Unequal Rights*.

⁹¹[91] Atinmo, *Sociocultural Implications of Wife Beating in Nigeria*.

Official and popular tolerance for domestic violence in Nigeria has been bolstered by the Islamization taking place in Muslim-majority states in the country. The use of regional governmental power to enforce *shari'a* in states where it has been instituted makes it more difficult for women's rights advocates to use national legislation as leverage; the very process of Islamization has been a rejoinder to a loss of power on a national level, and the promotion of regional autonomy has been a means of carving out a domain of control.

Nationalization: Any state that defines the official religion as Islam and draws upon religious law and jurisprudence for its legislation and policies, but does not derive or base *its own* authority exclusively on *shari'a* would fall within this category. By linking the power of the state to the application and enforcement of religious law, religion is nationalized under the auspices of state institutions. This includes much of the Arab world and some countries in Africa and Asia with Muslim majorities.

Blurring boundaries between religion and state power has been pursued in the interest of consolidating a national community, and as a means for states to promote their own legitimacy among sectors of society who are inclined to see a commitment to Islam as a marker of good government in the format of an Islamic social contract. This blurring leaves open some space for debate over the relationship between *shari'a* and other bodies of law. On matters of women's rights in general and domestic violence in particular, there is room for maneuver to seek state intervention and legal reform through reference to criminal and constitutional laws. However, there is also room for conservative constituencies to mobilize pressure on the state to enforce *shari'a* in a conservative manner. And when faced with critics pressing for liberal reforms, the state can resort to repression on the grounds that it has both the prerogative and the duty to defend Islam as an integral part of the national character.

Egypt provides a good example of all of these aspects and dynamics.^{92[92]} In principle, Egyptian law, including the constitution, provides women with a right to equality. However, in 1981, under pressure from Islamists, the Egyptian constitution was amended to provide that the principles of *shari'a* would constitute the main source of legislation. The Supreme Constitutional Court has been given the task of determining whether new legislation conforms to these principles. In practice, given the conservative ways in which *shari'a* is interpreted and applied to maintain male authority and female obedience, women's rights continue to be lesser than those of men and their vulnerability to violence is implicitly sanctioned by the state.

The issue of divorce is particularly illuminating of Egyptian women's limited rights and their vulnerability to violence. Egyptian courts follow a number of principles that function like legally binding precedents to bolster the negative implications of women's restricted right to divorce, even in cases of violence. For example, according to Principle 22, a husband's inappropriate conduct is not considered [by itself] grounds for divorce. ^{93[93]} Principle 59 states that a wife's return back to the home after having been harmed means that life could continue between them, which does not constitute grounds for divorce later.^{94[94]} Being beaten or hurt by her husband does not necessarily constitute grounds for a wife to leave the home. Instead, her option is to seek relief from a judge. Moreover, even if she pursues such a course, in the interim she must not refuse to be obedient to her husband while she continues to cohabit the marital home. If the judge finds sufficient proof of harm, and if he is unable to reconcile the couple, he can grant a divorce.^{95[95]}

Aside from the difficulties in meeting burdens of proof and the general reluctance on the part of judges to grant women a divorce, other factors impede women from pursuing this option. Often, women's families would not support such a decision or take them in, and establishing separate homes for themselves is both socially unacceptable and economically unfeasible for the vast majority. Another significant deterrent is the likelihood that women who seek divorce will lose custody over their children. And even if women do successfully obtain a divorce,

^{92[92]} For an example of a state's attack on domestic critics of *shari'a*, see the discussion of the Egyptian government's treatment of the Arab Women's Solidarity Association, in Mayer, *Cultural Particularism*, pp. 180-81.

^{93[93]} Marlyn Tadross, *Rightless Women, Heartless Men: Egyptian Women and Domestic Violence* (Cairo: The Legal Research and Resource Center for Human Rights, 1998), p. 18.

^{94[94]} Tadross, *Rightless Women, Heartless Men*, p. 18.

^{95[95]} Marlyn Tadross, Women between Reality and Law, in *Partial Citizenship: The Marginalization of Women in Egypt* [Arabic], eds. Tadrous, Abdulaziz al-Shabiti and Amira Abdulhakim (Cairo: The Legal Center and Resource Center for Human Rights, 1995), p. 57.

divorcees become subject to the authority of another male guardian, whether it is a father, brother, or another relative.

In January 2000, a new law pertaining to personal status issues was passed in Egypt; this reform was inspired by pressure from women's and human rights advocates, but the new law was a significantly watered-down version of the original proposed law. One of its provisions allows for judicial khul, allowing women to obtain a divorce without having to prove anything if they refund their dower to the husband and forfeit all financial rights and claims from the marriage. While this does, in principle, provide recourse for battered women who might not be able to obtain a divorce through litigious means, in practice the option is limited to women with the financial means to meet the repayment demands and renounce their financial claims.

While *shari'a* figures considerably in allowing domestic violence to thrive in Egyptian society by perpetuating women's subordination to male family members, and by reinforcing the privacy of family relations, it is important to emphasize that *shari'a* is not a *cause* of violence. Rather, intra-family violence derives legitimacy from culture and the social context. The variation in the magnitude of domestic violence based on social strata and class indicates that *shari'a* by itself is not a sufficient factor to explain the severity and scope of the phenomenon. Social location, whether defined by class, region, employment, relationship to spouse, or years of marriage, is significant in understanding domestic violence in Egypt.

According to a 1995 health survey that studied a representative sample of Egypt's population, most women who were ever married agree that husbands are justified in beating their wives at least sometimes. Women are most likely to agree that men are justified in beating their wives if the wife refuses him sex or if the wife answers him back.^{96[96]} This finding indicates that there is a high degree of tolerance for domestic violence in Egyptian culture, even among women. However, when it comes to the reasons people would justify or tolerate wife-beating, there is less agreement. Factors such as older age, years of marriage, marriage to a relative, the woman's original free consent to marriage, living in urban areas, higher levels of education, and wage employment all reduce the probability that a woman would agree that a husband has the right to beat his wife under any circumstance. Among those factors, higher education and employment are the most statistically significant. Nevertheless, even among those women who are most educated, around 65 percent agree that a husband is justified in beating his wife at least sometimes. Similarly, around 69 percent of women who bring income to their families justify wife beating at least sometimes.^{97[97]}

Given these attitudes, it is not surprising that domestic violence in Egypt is common.^{98[98]} While no studies have been conducted on psychological and emotional violence, the few studies that have examined the incidence of physical violence are sufficient to reflect the pervasiveness of this problem. The *Egypt Demographic and Health Survey*, conducted by the National Population Council in 1995, reported that one out of every three ever-married Egyptian women has been beaten at least once since marriage.^{99[99]} Of those women, 45 percent were beaten at least once in the past year and 17 percent were beaten three or more times in the same period.^{100[100]} Like attitudes toward wife beating, frequency of beating also depends on the social, economic and regional locations of the woman. For example, the same study found that wife beating was less frequent among women under the age of thirty, and much higher among women living in rural areas. Pregnancy does not seem to matter in deterring men from beating their wives. Overall, about one third of the women who have ever been beaten have been beaten during pregnancy.^{101[101]}

^{96[96]} El-Zanaty et al., *Egypt Demographic Survey 1995*, p. 206.

^{97[97]} El-Zanaty et al., *Egypt Demographic Survey*, p. 206-07.

^{98[98]} See Seager, *The State of Women in the World Atlas*, pp. 26-27.

^{99[99]} *Ibid.*, p. 208.

^{100[100]} *Ibid.*

^{101[101]} Among women beaten during pregnancy, a little more than half (56 percent) reported being beaten less frequently during pregnancy than otherwise. For the remaining women, pregnancy did not protect them from violence: they were beaten equally often or more often while they were pregnant compared with when they were not pregnant. El-Zanaty et al., *Egypt Demographic Survey*, p. 208.

The case of Egypt illustrates the ways in which *shari'a* contributes to the vulnerability of women to domestic violence, not by *mandating* violence per se, but by creating conditions in which it can be perpetrated with relative impunity. Socio-political pressures on the state by conservative constituencies have created a legal environment that undermines women's ability to seek state protection or intervention if this could be construed as violating Islamic principles. And popular and official understandings of these principles tend to construe female obedience as an imperative that supercedes their right to be free from violence. Although the possibilities for reform exist, activists are constrained by an atmosphere where commitment to *shari'a* is the priority, and this commitment is bolstered by state power.

Theocratization: In countries where the state defines itself as Islamic and bases its own authority on *shari'a*, religious law *is* the law of the state. In such contexts, defence of religion is conflated or conflatable with defence of the state, and critiques or challenges can be regarded and treated as heresy, which the state authorizes itself to punish. Iran and Pakistan represent examples of theocratization.

Iran defines itself as an Islamic Republic. Its official religion is Shi'i Islam (of the twelver Ja'afari school). Its legislature is an Islamic Consultative Assembly. A Council of Guardians comprised of clerics is authorized to ensure that all national laws are based on or compatible with Islamic criteria. Iran's supreme leader is an *ayatollah* (religious authority), and its top legal authorities must be *mujtahids*.

The Islamic revolution in 1979 was inspired, in part, by opposition to the Shah's reform of family laws, and one of the new government's first acts was the cancellation of the 1967 Family Protection Law, along with the institution of a wide set of policies that served to constrict women's rights in accordance with a conservative interpretation of *shari'a*. However, over time, the Iranian government has found compelling reasons or needs to expand rights and protections for women, in part to support the claim that Islamic government is good for its citizens. To these ends, in 1992, a new set of Divorce Amendments restored many of the elements of the abrogated 1967 law.

In Iran, the process of building and legitimizing a *modern* statist approach to Islam has opened up debates over *shari'a*, including dissenting views of patriarchal interpretations from within the *ulama*. This debate has taken a highly public form, notably in the pages of a women's magazine, *Zanan*. In a study of this debate, Ziba Mir-Hosseini writes,

[A] feminist re-reading of the *shari'a* is possible even becomes inevitable when Islam is no longer part of the oppositional discourse in national politics. This is so because once the custodians of the *shari'a* are in power, they have to deal with the contradictory aims set by their own agenda and discourse, which are to uphold the family and restore women to their true and high status in Islam, and at the same time to uphold men's *shari'a* prerogatives. The resulting tension which is an inherent element in the practice of *shari'a* itself, but is intensified by its identification with a modern state opens room for novel interpretations of the *shari'a* rules on a scale that has no precedent in the history of Islamic law.¹⁰²[102]

The articles and views published in *Zanan* have tended to deploy the method of *ijtihad*, raising questions about some of the most fundamental aspects of *shari'a*, including the legal basis for the assumption that men have authority over their families, or the obligation of unwilling women to submit to sex with their husbands. Within the context of a broader discussion about spousal relations, rights and duties, *Zanan* has focused specifically on the issue of domestic violence. Issue Number 18 (1994) is titled *Have You Ever Beaten Your Wife?* and Issue Number 19 (1994) is titled *Wife-Beating: Another Consequence of Men's Headship.*¹⁰³[103] Number 18 includes interviews with men, women and children about their personal experiences with domestic violence, and commentary by a female lawyer discussing the legal rights of a woman who is subjected to violence. Number 19 discusses the jurisprudential dimensions of domestic violence, including a reading of Sura 4, Verse 34 that draws upon fifteen

¹⁰²[102] Ziba Mir-Hosseini, *Stretching the Limits: A Feminist Reading of the Shari'a in Post-Khomeini Iran*, in Yamani, ed., *Feminism and Islam*, op. cit., pp. 285-86. See also her book, *Islam and Gender: The Religious Debate in Contemporary Islam* (Princeton, NJ: Princeton University Press, 2000).

¹⁰³[103] Mir-Hosseini, *Stretching the Limits*, pp. 310-11.

traditions of the Prophet and utilizes a variety of interpretative strategies to argue against the religious legitimacy of wife-beating. Although the situation in Iran remains one in which forms of domestic violence are socially accepted, there are also concerted efforts to put into place religious reasonings for its prohibition.

In this regard, the situation in Pakistan is notably different. The trend is toward more conservative interpretations and enforcement of *shari'a*, to the detriment of women. In fact, estimated rates of domestic violence in Pakistan are among the highest in the world.¹⁰⁴[104] These estimates range from 70 to upwards of 90 percent.¹⁰⁵[105]

Pakistan was created to provide a separate state for Muslims in South Asia, the nationalist aim being to avoid minority status and subjection to a Hindu majority in India. The constitutional debates following independence in 1947 were dominated by arguments over the place of *shari'a* in the country's legal system. Although religious leaders demanded that it become the basis for an Islamic state, they settled at the time for language that defined Pakistan as an Islamic republic with a judiciary that followed the British colonial model.

The Islamization of Pakistan's legal system began with Prime Minister Zulfikar Ali Bhutto in the mid-1970s, but was greatly expanded following the military coup that brought General Zia ul-Huq to power in 1979. Zia appealed to Islamic values to legitimize his regime and granted religious parties, which did not enjoy much popular support, a power they had not previously had and a role in revamping the legal system. The consequences were borne principally by women and minorities; in the first year of his rule, Zia reversed virtually all of the reforms that had benefited women in the previous 30 years.¹⁰⁶[106] He introduced the Hudood Ordinances, which changed the laws on rape and adultery and made fornication a crime, and the Law of Evidence, which renders the evidence of women equal to only half that of a man in some cases. He introduced *shari'a* benches in the High Courts, which became centralized as the Federal Shari'a Court in 1980. This court was authorized to review all laws to ensure their conformity with *shari'a*.

These changes to the legal system have reinforced deeply rooted attitudes about male domination.¹⁰⁷[107] In the 1990s, Pakistan's democratically elected governments were unable or unwilling to repeal any of the Islamization laws that had been enacted under Zia's martial law regime. In his second term (1997-99), Prime Minister Nawaz Sharif proposed an amendment to the Constitution that would completely replace the legal system with Islamic law. At the time of the coup that removed Sharif from power in October 1999, the bill remained stalled in parliament. According to Human Rights Watch,

Nawaz Sharif's continuing Islamization efforts ? reinforced the legitimacy of Zia ul-Huq's discriminatory Islamic laws; they have in effect also bestowed greater discretion and authority on judges to give legal weight, by invoking Islamic precedents and references at random, to biased assumptions about women in a variety of civil and criminal cases. For example, since 1996 courts have admitted cases challenging an adult woman's right to marry of her own free will, ostensibly an established right under family laws.¹⁰⁸[108]

¹⁰⁴[104] See Seager, *The State of Women in the World Atlas*, pp. 26-27.

¹⁰⁵[105] Human Rights Commission of Pakistan (HRCP) as well as an informal study conducted by the Women's Ministry concluded that at least 80 percent of all women in Pakistan are subjected to domestic violence. HRCP, *State of Human Rights in 1996* (Lahore: HRCP, 1997), p. 130; Women's Ministry [Pakistan], *Battered Housewives in Pakistan* (Islamabad: Women's Ministry, 1985). Amnesty International has reported that some 95 percent of women are believed to be subjected to such violence. Amnesty International, *Women's Human Rights Remain a Dead Letter* (London: Amnesty International, 1997), ASA 33/07/97. Amnesty International has also reported findings by women's groups in Pakistan that 70 percent of women are subjected to violence in their homes. Amnesty International, *Pakistan: No Progress on Women's Rights* (London: Amnesty International, 1998) [PATTY: page].

¹⁰⁶[106] See Shahnaz Rouse, *The Outsider(s) Within: Sovereignty and Citizenship in Pakistan*, in *Appropriating Gender: Women's Activism and Politicized Religion in South Asia*, eds. Patricia Jeffrey and Amrita Basu (New York: Routledge, 1998).

¹⁰⁷[107] Pakistan ranks near the bottom globally for almost every social indicator concerning the lives of women. Only 25 percent of Pakistani women are literate, compared to 55 percent of men. See Amnesty International, *Pakistan: No Progress on Women's Rights*; World Bank, Genderstats, www.genderstats.worldbank.org.

¹⁰⁸[108] Human Rights Watch (HRW), *Crime or Custom: Violence against Women in Pakistan* (New York: HRW, 1999).

In Pakistan, violence against women is endemic in all social spheres.¹⁰⁹[109] Yet despite the high incidence of intra-family violence, it is widely perceived by the law enforcement system and society at large as a private family matter. There is virtually no prosecution of crimes of assault and battery when perpetrated by male family members against women; even intra-family murder and attempted murder rarely are prosecuted.¹¹⁰[110] Although Pakistan ratified CEDAW in 1996, it has done little to reform its laws and practices to be in compliance with the convention.

In 1997, the Human Rights Commission of Pakistan (HRCP), an independent human rights organization, reported that

domestic violence remained a pervasive phenomenon. The supremacy of the male and subordination of the female assumed to be part of the culture and even to have sanction of religion made violence by one against the other in a variety of its forms an accepted and pervasive feature of domestic life.¹¹¹[111]

According to a United Nations report on domestic violence, the family structure in Pakistan is mirrored and confirmed in the structure of society, which condones the oppression of women and tolerates male violence as one of the instruments in the perpetuation of this power balance.¹¹²[112]

The Islamization of the judiciary in Pakistan has exacerbated the problem. Judges have broad discretion to use Islamic precedents and references in a variety of civil and criminal cases.¹¹³[113] Yasmine Hassan reports that in the absence of explicit criminalization of domestic violence, police and judges have tended to treat it as a non-justiciable, private or family matter or, at best, an issue for civil, rather than criminal, courts.¹¹⁴[114] If a domestic violence case does come before a criminal court, it falls under the Qisas and Diyat Ordinance of 1990, a body of Islamic criminal laws dealing with murder, attempted murder, and the crime of causing bodily hurt (both intentional and unintentional). The law awards punishment either by *qisas* (retribution) or *diyat* (compensation) for the benefit of the victim or his or her legal heirs.¹¹⁵[115] In *qisas* and *diyat* crimes, the victim or heir has the right to determine whether to exact retribution or compensation, or to pardon the accused. If the victim or heir chooses to waive *qisas*, or *qisas* is judicially held to be inapplicable, an offender is subject to *tazir* or discretionary punishment in the form of imprisonment.¹¹⁶[116] In effect, the *qisas* and *diyat* laws have converted serious crimes, including murder and assault, into crimes against the individual rather than the state. In addition, women who have suffered domestic violence come under pressure by relatives to waive *qisas* altogether.¹¹⁷[117] *Qisas* may not even apply in cases of wife murder if the woman has any children,

¹⁰⁹[109] HRCP, *State of Human Rights in 1997* (Lahore: HRCP, 1998), p. 130.

¹¹⁰[110] See generally Amnesty International, *Pakistan: Women's Human Rights Remain a Dead Letter*.

¹¹¹[111] HRCP, *State of Human Rights in 1997*, p. 185.

¹¹²[112] *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace*, Copenhagen, 14-30 July 1980 (UN Publication, Sales No. E.80.IV.3 and Corrigendum), p. 30, cited in Yasmine Hassan, *The Haven Becomes Hell* (Lahore: Shirkat Gah, 1995), p. 6.

¹¹³[113] HRW, *Crime or Custom?*, p. 23.

¹¹⁴[114] See Hassan, *The Haven Becomes Hell*, pp. 57, 60.

¹¹⁵[115] For a detailed discussion of the *qisas* and *diyat* laws, see Human Rights Watch, *Crime or Custom*; Evan Gottesman, The Reemergence of *Qisas* and *Diyat* in Pakistan, *Columbia Human Rights Law Review* 23/2, pp. 433-61.

¹¹⁶[116] According to Gottesman, the Federal Shari'a Court (an Islamic appellate court) has indicated that only crimes against the rights of God should be subject to *tazir*, not crimes against the rights of man. Distinguishing between the two categories of crimes involves determining whether the offender poses a threat to society at large. Gottesman, The Reemergence of *Qisas* and *Diyat* in Pakistan, pp.

¹¹⁷[117] HRW, *Crime or Custom?*, pp. 41-42. See also Farida Shaheed, The Experience in Pakistan, in Davies, ed., *Women and Violence*, op. cit., p. 217.

because under Section 306(c) of the Penal Code, the child or heir of the victim would also be a direct descendant of the offender. In most cases of spousal murder, the offender enjoys total legal impunity.

Honor killing represents a particular manifestation of domestic violence in which women are killed because they are seen as the repositories of family honor.¹¹⁸[118] Although such killings fall under the murder provisions of the *qisas* and *diyat* laws, the courts generally apply the English common law principle of "grave and sudden provocation" and award little or no punishment. The murder of Samia Sarwar in her lawyer's office in Lahore on April 6, 1999, is a case in point. She was shot to death by a hit man allegedly retained by her parents, but to date, no one has been punished for the killing. In another example, a man was tried for killing his daughter and a young man when he found them in a compromising state. The judge sentenced the father to life imprisonment and a fine of Rs. 20,000 (U.S.\$ 500). When the case came before the Lahore High Court, the sentence was reduced to five years imprisonment and a fine of Rs. 10,000 (\$250) on the grounds that the man's actions were justified because his victims were engaging in immoral behavior that could not be tolerated in an Islamic state such as Pakistan.¹¹⁹[119] Another court used its discretionary authority under Section 338-F of the amended Penal Code which expressly permits the court to assess culpability on the basis of the Qur'an and *hadith* to decide that the right of self-defense could be invoked by male defendants in honor killings because a man who kills another man for defiling the honor of his wife or daughter is protecting his property and acting in self-defense.¹²⁰[120]

Women who attempt to report domestic abuse encounter serious obstacles. Police tends to respond to such reports by trying to reconcile the concerned parties rather than filing charges and arresting the perpetrator. Further compounding the problem, doctors who perform examinations tend to be skeptical of women's claims of abuse. For example, the head medico-legal doctor for the city of Karachi claimed that 25 percent of such women come with self-inflicted wounds.¹²¹[121] Of 215 cases of women being suspiciously burned to death in their Lahore homes in 1997, in only six cases were suspects even taken into custody.¹²²[122]

Domestic abuse in Pakistan takes many forms, including being burned, disfigured with acid, beaten, threatened, and even killed. In its annual report for 1997, HRCP reported, The worst victims were women of the poor and middle classes. Their resourcelessness not only made them the primary target of the police and the criminals, it also rendered them more vulnerable to oppressive customs and mores inside homes and outside.¹²³[123] According to HRCP,

The extreme forms it took included driving a woman to suicide or engineering an accident (frequently the bursting of a kitchen stove) to cause her death usually when the husband, often in collaboration with his side of the family, felt that the dower or other gifts he had expected from his in-laws in consequence of the marriage were not forthcoming, or/and he wanted to marry again, or he expected an inheritance from the death of his wife.¹²⁴[124]

According to the Lahore press, an average of more than four women were burnt in their homes weekly in 1997, three out of four fatally.¹²⁵[125] In 1997, there was not a single conviction in a stove-death case in the country.¹²⁶[126]

¹¹⁸[118] HRCP, *State of Human Rights in 1997*, p. 187.

¹¹⁹[119] *Ibid.*

¹²⁰[120] HRW, *Crime or Custom?*, pp. 44-45.

¹²¹[121] *Ibid.*, p. 2.

¹²²[122] *Ibid.*, p.1.

¹²³[123] HRCP, *State of Human Rights in 1996*, p. 184.

¹²⁴[124] HRCP, *State of Human Rights in 1997*, p. 185.

¹²⁵[125] *Ibid.*

¹²⁶[126] *Ibid.*

Some 265 women were killed in other incidents of intra-family violence by husbands, in-laws, brothers and fathers.¹²⁷[127]

These statistics, although partial, and accounts of the abuse of women provide powerful evidence of the failure on the part of the Pakistani state to defend women from violence. Islamization of the country's legal regime has increased their vulnerability, and to the extent that these changes are acceptable to powerful constituencies, it is difficult for recent governments to institute law reforms, even if they were so inclined, because of the inevitable protests that this would provoke. However, the particular ways in which *shari'a* is interpreted and enforced in Pakistan innovating to achieve the most conservative possible approach is subject to criticism that the Quranic principles are being violated. The debates and liberalizing trends (albeit limited) occurring in Iran provide a salient contrast to Pakistan's approach to theocratization.

As the above examples demonstrate, the relationship between religion and the state is important in understanding the problem of domestic violence. The examples also demonstrate that the application of *shari'a* contributes to the problem, but variations are significant. In many societies, increasingly conservative interpretations of *shari'a* reinforce social and cultural norms of masculine authority, female obedience, and the legitimacy of violence to maintain those arrangements. To varying extents, *shari'a* sustains official and/or popular *indifference* to the interests and needs of women who are victims or potential victims. In the context of family relations, women are legally constructed (whether *de jure* or *de facto*) as legitimate targets if aggression can be construed as instrumental to the maintenance of order in the family and in society at large.

Conclusion

Ultimately, the state is responsible for the regulation, restriction and punishment of violence. If *shari'a* functions legally and/or socially as a basis for maintaining women as wards of their men rather than full legal subjects of the state, and if violence against women within the context of families is not regarded *as violence* but as a legitimate means of social control, the harms women suffer go not only unpunished but unrecognized *as harms*. Thus, even if states commit themselves to the principle of women's rights (e.g., non-discriminatory clauses in national civil legislation, accession to international conventions), if they do not commit their resources to protect women from violence at home, they fail *as states* to assume their responsibility.

The authoritarian nature of many states in the Middle East, Africa and Asia bolsters patriarchal family relations, and fosters social and religious conservatism.¹²⁸[128] According to Deniz Kandiyoti,

The failure of modern states to create and adequately redistribute resources intensified tensions and cleavages expressed in religious, ethnic and regional terms. As the state itself uses local patronage networks and sectional rivalries in its distributive system, citizens also turn to their primary solidarities both to protect themselves and to compensate for inefficient administration. This reinforces the stranglehold of communities over their women, whose roles as boundary markers become heightened.¹²⁹[129]

When the state is incapable or unwilling to represent the interests of members of society, the importance of family and kinship relations for social survival is inflated. Consequently, any challenges to patriarchal authority in the domestic sphere including but not limited to challenges to the use of violence can be construed as threats to the family as an institution. This, in turn, lends itself to the idea that empowering women would corrode and menace the family, and that efforts to do so are, therefore, both dangerous and alien. Conservative interpretations of Islam, enforced through *shari'a*, provide a means of counteracting this threat, which, as the irony comes full circle, the state is willing to champion as a means of shifting critical attention from its own failings onto the putative dangers posed by advocates of women's rights.

¹²⁷[127] HRCF, *State of Human Rights in 1997*, p. 186.

¹²⁸[128] See Hisham Sharabi, *Neopatriarchy: A Theory of Distorted Change in Arab Society* (NY: Oxford University Press, 1988).

¹²⁹[129] Kandiyoti, Introduction, *op. cit.*, pp. 13-14.

Although *shari'a* is administered, interpreted and used in a multitude of ways across Muslim societies, it provides justification for failures and refusals on the part of states to act responsibly to provide women the rights and protections that they are due as humans, as citizens, as women and as Muslims. And to the extent that popular notions about *shari'a* conceive of certain forms of violence against women as normative and/or legitimate, this undercuts the efforts of those who seek to press the state to assume and exercise its responsibility.

In conclusion, because of the importance of the state and the failure of so many states to protect and ensure the rights of its citizen struggles for women's rights can be seen as part of a broader struggle against authoritarianism, not a rejection of religion or culture. Many rights activists throughout the three regions are striving to cultivate and clarify this distinction, and it is to them that this study is dedicated with the hope that it can contribute to their cause.

<http://www.law.emory.edu/IFL/thematic/Violence.htm>